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RECOVERY OF ECONOMIC LOSSES UNDER THE
MASSACHUSETTS OIL AND HAZARDOUS MATERIAL
RELEASE PREVENTION AND RESPONSE ACT:
CHAPTER 21E

*Karen Beth Clark**

I. INTRODUCTION

Environmental litigation has increased drastically in the 1990s.¹ Much of this litigation has focused on the effects of environmental contamination on businesses.² A business traditionally suffers injury due to hazardous waste releases in the form of property damage or economic loss.³ When a business sustains damage to its property through a hazardous waste release that has emanated from an outside source, or that was present when the business took possession of the property, the cleanup process is often long and costly.⁴ More importantly, however, businesses also suffer effects of hazardous waste releases that are as devastating, if not more so, than property damage.⁵ These effects are called economic losses, and they may be incurred in a variety of ways.⁶

During the cleanup of hazardous waste contamination a nearby business may be required to temporarily shut down its operations so as to eliminate any potential danger to its employees.⁷ This temporary

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¹ David P. Rosenblatt & Joseph J. Floyd, *Private Environmental Litigation on the Rise*, 20 M.L.W. 1507, 1507 (1992).

² *Id.*

³ *See id.*

⁴ *See id.*

⁵ *J'Aire Corp. v. Gregory*, 598 P.2d 60, 64 (Cal. 1979).

⁶ *See Rosenblatt & Floyd, supra* note 1, at 1507.

⁷ *Id.*

shut-down will likely cause an interruption in the business and the loss of valuable profits.⁸ Furthermore, clean-up efforts may be so extensive, or the costs so exorbitant, that a business may be forced to shut down permanently given its inability to operate or to afford the clean-up expenses.⁹

Increasingly, businesses faced with economic losses caused by hazardous waste cleanup are seeking judicial remedies to recover for these losses.¹⁰ To aid in their efforts, these plaintiffs are employing both federal and state environmental statutory schemes along with the common law.¹¹

The primary vehicle for recovering the costs of hazardous waste cleanup, under federal law, is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹² CERCLA authorizes the government to clean up hazardous waste releases, to recover their response costs from responsible parties, and to mandate hazardous waste cleanup directly by those responsible for a release.¹³ In addition, many states have enacted legislation closely resembling CERCLA.¹⁴ The Massachusetts Oil and Hazardous Material Release Prevention and Response Act, (chapter 21E) is such a statute.¹⁵ Like its federal counterpart, chapter 21E authorizes the Massachusetts Department of Environmental Protection to clean up hazardous substance releases and permits the Commonwealth to recover its related expenses from the parties responsible for these releases.¹⁶ Chapter 21E also holds parties that are responsible for hazardous substance releases liable to those who have suffered damage to their property as a result of the release.¹⁷ Accordingly, chapter 21E provides recovery for damage to a person's "real or personal property."¹⁸ This statutory language, however, is ambiguous in that it fails to clearly state whether a party responsible for a release is liable under the statute

⁸ *Id.* at 1508.

⁹ *Id.*

¹⁰ *Id.* at 1507.

¹¹ *Id.*

¹² 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1991).

¹³ 42 U.S.C. §§ 9604-9607 (1988 & Supp. III 1991); Donald R. Frederico & Richard H. Baird, *Introduction: A Brief Overview of Federal and Massachusetts Environmental Laws*, 75 MASS. L. REV. 91, 94 (1990).

¹⁴ Elaine C. Warren, *State Hazardous Waste Superfunds and CERCLA: Conflict or Complement?*, 13 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,348 (Nov. 1983).

¹⁵ MASS. GEN. L. ch. 21E, §§ 1-18 (1992); Frederico & Baird, *supra* note 13, at 94; Lee P. Breckenridge, *Superfund Enforcement in Massachusetts*, 452 ALI-ABA 19, 19 (1989).

¹⁶ MASS. GEN. L. ch. 21E, §§ 4-5 (1992).

¹⁷ ch. 21E, § 5.

¹⁸ *Id.*

to a business for economic losses such as lost profits, lost sales, and business interruption damages.¹⁹

While economic losses are often as great, if not greater than, any property damage or physical injury,²⁰ many courts have denied plaintiffs recovery for their purely economic losses.²¹ The courts' worthy concerns focus on the possibility of resulting unlimited liability, mass litigation, frivolous suits, and the imposition of liability disproportional to the defendant's fault.²² Yet despite these concerns, many courts and legislatures have, in certain circumstances, allowed for the recovery of purely economic losses.²³

This Comment explores the recovery of economic losses under chapter 21E by innocent businesses faced with the effects of hazardous waste contamination on nearby property that has affected their operations in a purely economic manner. The Massachusetts Supreme Judicial Court has addressed the issue of economic loss recovery and held that plaintiffs may not recover for purely economic losses under chapter 21E.²⁴ This interpretation, however, is inadequate and is refuted by the common law, as well as by other state and federal statutory schemes which regulate the cleanup of hazardous waste.²⁵ Section II of this Comment focuses on the definition of economic losses.²⁶ Section III then analyzes the treatment of economic losses under the common law, as well as under federal and state statutory schemes.²⁷ This section then discusses chapter 21E's ambiguous treatment of economic losses.²⁸ Section IV focuses on the recent Massachusetts Supreme Judicial Court opinion denying the recovery of economic

¹⁹ See *id.*; Rosenblatt & Floyd, *supra* note 1, at 1507.

²⁰ *J'Aire Corp. v. Gregory*, 598 P.2d 60, 64 (Cal. 1979).

²¹ Kelly M. Hnatt, *Purely Economic Loss: A Standard for Recovery*, 73 IOWA L. REV. 1181, 1181-82 & n.3 (1988). Purely economic losses are those unaccompanied by physical injury or property damage. *Id.* at 1181. Courts allow for the recovery of economic losses when they are accompanied by either physical injury or property damage. See *id.*

²² *Id.* at 1183. "[A] court usually perceives the physical consequences of negligence as limited, but it considers indirect economic injury as unbounded." *Id.* Courts also note other concerns such as, "the risk of an increase in fraudulent claims, the potential for mass litigation, and the possibility of unlimited liability, . . . the waste of limited resources in distinguishing fraudulent claims from valid losses, . . . and the fear of disproportionate liability in the form of large, speculative jury verdicts that would be wholly out of proportion to a defendant's fault." *Id.*

²³ Pegeen Mulhern, *Marine Pollution, Fisheries, and the Pillars of the Land: A Tort Recovery Standard for Pure Economic Losses*, 18 B.C. ENVTL. AFF. L. REV. 85, 95 (1990); see *infra* notes 99-176 and accompanying text.

²⁴ *Garweth Corp. v. Boston Edison Co.*, 613 N.E.2d 92, 94-95 (Mass. 1993).

²⁵ See *infra* notes 295-345 and accompanying text.

²⁶ See *infra* notes 31-47 and accompanying text.

²⁷ See *infra* notes 48-233 and accompanying text.

²⁸ See *infra* notes 234-70 and accompanying text.

losses under chapter 21E and suggests that the court's analysis was flawed.²⁹ Finally, Section V proposes that the Massachusetts Legislature amend chapter 21E to allow for the limited recovery of economic losses according to a standard based on a defendant's ability to foresee that a class of plaintiffs would incur economic losses.³⁰

II. ECONOMIC LOSSES

Economic losses have become increasingly important in the context of hazardous waste contamination and its effect on businesses. Economic losses are defined by author Pegeen Mulhern as encompassing those losses that are neither a result of physical injury or property damage.³¹ Such a definition, however, is far from helpful. Yet despite the wide-spread use of the term economic loss, courts and commentators have failed to provide a more consistent and concise definition. For example, one author has defined an action to recover for economic losses as "an action brought to recover damages for inadequate value, costs of repair, and replacement of defective goods or consequent loss of profits—without any claim of personal injury or damage to other property."³² Another author has stated that purely economic loss is "the financial harm arising out of wrongful interference with plaintiff's contractual relations or with his or her non-contractual prospective gain."³³

Given the lack of a consistent definition, it is more instructive to determine what types of losses are categorized as economic harm in order to better understand the concept of economic loss. Economic losses may manifest themselves in a variety of forms. For example, economic losses often occur in the form of lost profits, business interruption damages, lost earnings, and losses of prospective economic advantage.³⁴ They may also exist in the form of consequential economic losses such as increased overhead, clean-up costs, and repair costs, as well as the loss of expected proceeds, lost opportunities, and damages paid to third parties resulting from a defendant's negli-

²⁹ See *infra* notes 271–345 and accompanying text.

³⁰ See *infra* notes 346–94 and accompanying text.

³¹ Mulhern, *supra* note 23, at 86.

³² Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966).

³³ Mario J. Rizzo, *A Theory of Economic Loss in the Law of Torts*, 11 J. LEGAL STUD. 281, 281 (1982).

³⁴ Mulhern, *supra* note 23, at 87.

gence.³⁵ Economic losses may also include business overhead expenses, travel expenses, and efforts to minimize damage.³⁶

A business may experience economic losses due to an environmental release in a variety of different ways. For example, a business may experience a loss if it is forced to shut down temporarily or permanently in order to clean up hazardous materials.³⁷ When a business must temporarily close its doors, the method used to measure the economic loss is usually a lost profits analysis.³⁸ Such a valuation involves calculating the value of the sales opportunities that were lost due to the defendant's conduct.³⁹ A business also may be forced to close down permanently due to a release of hazardous waste on nearby property that has severely affected its operations in a purely economic manner.⁴⁰ In this case, the economic losses incurred by the business would most likely be the current market value of the business in an uncontaminated condition.⁴¹

A business may also incur an economic loss in the value of its assets if it continues to operate while it undertakes to clean up a hazardous waste release.⁴² In this case, the business may experience difficulty in marketing its assets due to the contamination problem and may even find that its assets are incapable of being sold at fair value.⁴³ The business may be required to sell its assets at lower prices due to the "taint" of the environmental contamination.⁴⁴ This discount is referred to as a diminution in value and is subject to a variety of different calculations.⁴⁵

The recovery of economic losses has long been debated in the courts and legislatures of the United States.⁴⁶ The Massachusetts Legislature alluded to the recovery of these losses in chapter 21E but used

³⁵ Hnatt, *supra* note 21, at 1187-88 & n.26.

³⁶ Mulhern, *supra* note 23, at 87.

³⁷ Rosenblatt & Floyd, *supra* note 1, at 1508.

³⁸ *See id.*

³⁹ *Id.* This valuation also considers the company's lost contribution to the profits from those lost sales. *Id.* This contribution of the company's profits from lost sales is commonly called the profit margin and is equal to the product sales price minus all of the expenses the company incurred to produce its product that were not incurred due to the interruption. *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* This discount may be measured by "an analysis of comparable sales transactions, a study of illiquidity premiums for investors in unmarketable securities, as well as a review of studies of marketability discounts." *Id.*

⁴⁶ *See infra* notes 48-233 and accompanying text.

vague terminology which permitted the Supreme Judicial Court to interpret the statute so as to deny the recovery of economic losses.⁴⁷ Before examining the Massachusetts courts' treatment of this issue, however, it is helpful to examine how the common law and statutory schemes have treated the recovery of purely economic losses.

III. TREATMENT OF ECONOMIC LOSSES UNDER COMMON LAW AND STATUTORY SCHEMES

A. *Common Law Physical Injury Rule*

The common law has consistently provided that economic losses may not be recovered unless the plaintiff suffers an accompanying physical injury or property damage.⁴⁸ This rule restricting recovery is often referred to as the physical injury rule and is almost universally applied in a variety of contexts.⁴⁹ This rule is virtually a *per se* bar to the recovery of purely economic losses and finds its origin in two early cases.⁵⁰ In *Robbins Dry Dock & Repair Co. v. Flint*, the United States Supreme Court held that plaintiffs who chartered a ship were prohibited from recovering their lost use and lost profits caused by the defendant's negligent repair of the ship's propeller.⁵¹ The Court held that the individual who merely chartered, but did not own, the ship could not recover for his economic losses because he suffered no physical injury or property damage.⁵² The Court, however, held that the ship's owner was entitled to sue for economic losses

⁴⁷ MASS. GEN. L. ch. 21E, § 5 (1992); *Garweth Corp. v. Boston Edison Co.*, 613 N.E.2d 92, 94-95 (Mass. 1993).

⁴⁸ See *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 53 (1st Cir. 1985); *Just's Inc. v. Arlington Constr. Co.*, 583 P.2d 997, 1005 (Idaho 1978); *Stop & Shop Companies, Inc. v. Fisher*, 444 N.E.2d 368, 371 (Mass. 1983); *People Express Airlines v. Consolidated Rail*, 495 A.2d 107, 109 (N.J. 1985); see also *Byrd v. English*, 43 S.E. 419, 420-21 (Ga. 1903) (printing plant owner prohibited from recovering lost profits when defendant negligently interrupted power being supplied to plant); *Stevenson v. East Ohio Gas Co.*, 73 N.E.2d 200, 201, 203-04 (Ohio Ct. App. 1946) (plaintiff employee prevented from recovering lost wages after unable to work due to fire negligently caused by defendant's damage to stored liquified natural gas); RESTATEMENT (SECOND) OF TORTS § 766C (1977) (plaintiff may not recover for purely economic losses without accompanying physical harm); Fleming James, Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43, 43 (1972).

⁴⁹ Mulhern, *supra* note 23, at 87 n.15.

⁵⁰ *People Express*, 495 A.2d at 109. This rule is based on *Robbins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), and *Cattle v. Stockton Waterworks Co.*, 10 Q.B. 453 (1875). Yet neither of these two cases explicitly forbids the recovery of purely economic losses. *People Express*, 495 A.2d at 109.

⁵¹ *Robbins Dry Dock*, 275 U.S. at 308-09.

⁵² See *id.* at 308.

caused by the negligent damage to the ship because he had suffered damage to his property.⁵³ Similarly, in *Cattle v. Stockton Waterworks Co.*, the Queen's Bench Court held that the plaintiff could not recover for economic losses when the defendant's negligence prevented the plaintiff from performing a contract to repair a road.⁵⁴ The defendant company negligently maintained a water pipe under a roadway.⁵⁵ The plaintiff, hired to build a tunnel under the road, began work that was obstructed by a leak in the defendant's water pipe.⁵⁶ The plaintiff finished the tunnel but incurred economic losses in the process.⁵⁷ The court denied any recovery for these losses due to the lack of physical injury or property damage suffered by the plaintiff.⁵⁸

Over the years, the courts have cited various reasons for the physical injury rule. The most critical basis for the rule is the protection from unlimited liability of defendants who cause extensive damages.⁵⁹ Other justifications for the rule expressed by courts are the prevention of fraudulent claims and mass litigation.⁶⁰ Lastly, the courts have expressed a concern that liability be measured and imposed according to the proportion of the defendant's fault.⁶¹ To address these concerns, courts have applied the physical injury rule because the requirement of physical injury or property damage limits the number of plaintiffs who can sue, legitimizes their claims, and allows for proportional liability.⁶²

The Massachusetts courts have applied the physical injury rule to allow for the recovery of economic losses when they are accompanied by physical injury or property damage.⁶³ For example, in *Newlin v. New England Telephone & Telegraph Co.*, the Massachusetts Su-

⁵³ See *id.* "The injury to the propeller was no wrong to the respondents [charterers] but only to those to whom it belonged." *Id.*

⁵⁴ *Cattle v. Stockton Waterworks Co.*, 10 Q.B. 453 (1875), cited in Hnatt, *supra* note 21, at 1188.

⁵⁵ *Cattle*, 10 Q.B. at 455-56 (1875), cited in Hnatt, *supra* note 21, at 1188.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *People Express Airlines v. Consolidated Rail*, 495 A.2d 107, 110 (N.J. 1985); see Hnatt, *supra* note 21, at 1190.

⁶⁰ *People Express*, 495 A.2d at 110; *J'Aire Corp. v. Gregory*, 598 P.2d 60, 65 (Cal. 1979); *Stevenson v. East Ohio Gas Co.*, 73 N.E.2d 200, 203 (Ohio Ct. App. 1946); *Kinsman Transit Co. v. City of Buffalo*, 388 F.2d 821, 823 (2d Cir. 1968); Hnatt, *supra* note 21, at 1191.

⁶¹ *People Express*, 495 A.2d at 110; *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 55 (1st Cir. 1985); *Kinsman Transit*, 388 F.2d at 823; Mulhern, *supra* note 23, at 91; Hnatt, *supra* note 21, at 1193.

⁶² See Hnatt, *supra* note 21, at 1183.

⁶³ See *infra* notes 64-71 and accompanying text.

preme Judicial Court applied the physical injury rule to allow the plaintiffs to recover for their economic losses.⁶⁴ In *Newlin*, a telephone pole, negligently maintained by the defendant, fell onto a power line and disabled electrical equipment used by the plaintiff to grow mushrooms.⁶⁵ The mushrooms overheated and the crop was destroyed.⁶⁶ The court awarded the plaintiff recovery for economic losses because there was an accompanying physical injury to the mushroom crop.⁶⁷ Then too, relying on *Newlin*, the Supreme Judicial Court awarded economic losses in *Kilduff v. Plymouth County Electric Co.*, when the plaintiff's house was destroyed by an electrical fire started when an electrical wire slipped from the defendant's hands onto the plaintiff's home.⁶⁸ Given the occurrence of property damage, the plaintiff was able to recover for his economic losses.⁶⁹ Similarly, in *Morani v. Agatha Fisheries, Inc.*, the Federal District Court of Massachusetts relied on *Newlin* to award economic losses to a worker who sustained severe injuries after falling eight feet to the ground due to carbon monoxide exposure.⁷⁰ The district court provided for the recovery of economic losses as they were accompanied by physical injury.⁷¹

The Massachusetts courts also have applied the physical injury rule to deny recovery for economic losses when they are unaccompanied by physical injury or property damage.⁷² For instance, in *McDonough v. Whalen*, the plaintiff's property decreased in value after the defendants defectively designed and installed a septic system in the plaintiff's home.⁷³ The appeals court held that, "[i]n the absence of personal injury or physical damage to property, the negligent supplier of defective products is not ordinarily liable in tort to a purchaser for simple pecuniary loss caused by defective or inferior merchandise."⁷⁴ Then too, in *Marcil v. John Deere Industrial Equipment Co.*, the

⁶⁴ 54 N.E.2d 929, 931 (Mass. 1944).

⁶⁵ *Id.* at 930.

⁶⁶ *Id.*

⁶⁷ See *id.* at 931; *Stop & Shop Companies, Inc. v. Fisher*, 444 N.E.2d 368, 371 (Mass. 1983).

⁶⁸ See 203 N.E.2d 679, 680-81 (Mass. 1965).

⁶⁹ See *id.*; *Stop & Shop*, 444 N.E.2d at 371.

⁷⁰ See 213 F. Supp. 257, 258, 259-60 (D. Mass. 1963). The court awarded the plaintiff damages for his diminution of earning capacity. *Id.* at 260.

⁷¹ See *id.*

⁷² See *infra* notes 73-83 and accompanying text.

⁷³ 304 N.E.2d 199, 201 (Mass. App. Ct. 1973), *rev'd on other grounds*, 313 N.E.2d 435 (Mass. 1974).

⁷⁴ *Id.* (footnotes omitted). The Supreme Court later reversed this decision, but did not hold that the rule applied by the appeals court was incorrect. *McDonough v. Whalen*, 313 N.E.2d 435, 438 (Mass. 1974). It merely found that the plaintiffs had in fact experienced physical property damage to their land. *Id.* at 440.

Massachusetts Appeals Court held that a negligent defendant's mere infliction of severe economic harm did not warrant the recovery of those business losses.⁷⁵ In *Marcil*, the plaintiff purchased a vehicle from the defendant to aid in his excavation business.⁷⁶ The plaintiff experienced difficulty with the vehicle due to the defendant's negligent manufacture of the product.⁷⁷ Relying on *McDonough v. Whalen*, the court denied recovery for the mere "pecuniary losses" because they were unattended by physical injury or property damage.⁷⁸ Lastly, in *Stop & Shop Companies, Inc. v. Fisher*, the plaintiff sought damages for loss of business revenues from its supermarket and department stores after the defendant's barge negligently collided into a drawbridge.⁷⁹ The damaged bridge denied customers access to the plaintiff's stores on the other side of the bridge for two months.⁸⁰ While the court did not foreclose the possibility of economic loss recovery under a nuisance theory, the court refused to allow for the recovery of these losses under a negligence analysis.⁸¹ The court reasoned that the plaintiff's losses were not the result of any physical damage to its property.⁸² Rather, the court stated that "[i]n negligence cases, recovery has wisely been confined to physical damage to the plaintiff's property."⁸³

Over time, however, the physical injury rule has exhibited various shortcomings which have influenced many courts to reevaluate the rule's effectiveness in reaching its purported goals. Commentators and courts argue that the physical injury rule arbitrarily, randomly, and crudely distinguishes recoverable economic losses from non-recoverable harm by the fortuitous occurrence of physical injury or property damage.⁸⁴ The rule thus allows those who sustain economic losses accompanied by physical injury or property damage to recover, while it prevents those who suffer only economic losses from receiving a remedy.⁸⁵ In fact, plaintiffs who experience physical injury or prop-

⁷⁵ 403 N.E.2d 430, 434 (Mass. App. Ct. 1980).

⁷⁶ *Id.* at 431-32.

⁷⁷ *Id.* at 432.

⁷⁸ *Id.* at 434.

⁷⁹ *Stop & Shop Companies, Inc. v. Fisher*, 444 N.E.2d 368, 369 (Mass. 1983).

⁸⁰ *Id.* at 370.

⁸¹ *Id.* at 371-72.

⁸² *See id.* at 371.

⁸³ *Id.* at 374.

⁸⁴ Hnatt, *supra* note 21, at 1195.

⁸⁵ P.S. Atiyah, *Negligence and Economic Loss*, 88 L. Q. REV. 248, 252 (1967). In fact, a business' injury may often lead to more significant losses than physical injury or property damage. *J'Aire Corp. v. Gregory*, 598 P.2d 60, 64 (Cal. 1979).

erty damage may recover for their economic losses even when such economic losses far exceed their physical injury or property damage.⁸⁶ Some courts have described this result as “capriciously shower[ing] compensation along the path of physical destruction.”⁸⁷ Others argue that such a result is especially outrageous when one considers that “property is merely one form of financial loss, and is perfectly capable of being remedied by an award of damages in money.”⁸⁸ As one author described, such an arbitrary and harsh distinction between recoverable economic losses and non-recoverable harm is both “crude and unreliable.”⁸⁹

In addition, some commentators and courts argue that strict adherence to the physical injury rule impedes the purpose of tort law—“that wronged persons should be compensated for their injuries and that those responsible for the wrong should bear the cost of their tortious conduct.”⁹⁰ By striving to achieve this purpose by allowing for the recovery of purely economic losses, courts would discourage similar tortious behavior, foster safer products, vindicate safety conscious conduct, and ultimately shift “the risk of loss and associated costs of dangerous activities to those who should be and are best able to bear them.”⁹¹

B. Exceptions to Physical Injury Rule

To avoid these inherent problems with the *per se* physical injury rule, and to address the concerns which led to its imposition, many courts are employing a variety of alternative theories to allow for the recovery of purely economic losses.⁹² Courts have adopted these theories because the risks of unlimited liability, mass litigation, fraudulent claims, and disproportionate liability support only a limitation to the recovery of economic losses rather than a complete bar.⁹³ Thus, the courts in many instances have bypassed the strict physical injury rule and allowed for the recovery of purely economic losses.⁹⁴ Recovery under these theories, however, is not unbounded. Rather, these alternate methods impose more liberal and flexible limits on the recovery

⁸⁶ Hnatt, *supra* note 21, at 1195.

⁸⁷ *People Express Airlines v. Consolidated Rail*, 495 A.2d 107, 111 (N.J. 1985).

⁸⁸ Atiyah, *supra* note 85, at 269–70.

⁸⁹ Hnatt, *supra* note 21, at 1196.

⁹⁰ *People Express*, 495 A.2d at 111.

⁹¹ *Id.*

⁹² *Id.*; see *infra* notes 100–76.

⁹³ *People Express*, 495 A.2d at 110.

⁹⁴ See *infra* notes 100–76 and accompanying text.

of economic losses than the *per se* bar to recovery under the physical injury rule.⁹⁵ When courts have engaged these liberalized limitations, there is no indication that unfair recovery has resulted.⁹⁶

Thus, two lines of cases have emerged. Many courts adhere to the use of the physical injury rule and allow for the recovery of economic losses only when accompanied by physical injury or property damage.⁹⁷ Other courts, however, have found the physical injury rule too inflexible and thus, have employed more liberal and flexible means to determine when plaintiffs may recover for economic losses.⁹⁸ Under these theories, some courts have held that economic losses may be recovered even when they are unaccompanied by physical injury or property damage.⁹⁹

1. Special Relationship

One approach utilized by courts to impose a more liberal limit on the recovery of purely economic losses is to allow for the recovery of these losses when a “special relationship” exists between the plaintiff who has suffered economic loss and the negligent tortfeasor.¹⁰⁰ The cases adopting this approach often involve the tort of negligent misrepresentation in which plaintiffs have been economically injured by the negligent performance of the defendant’s services.¹⁰¹ One court has stated that “[t]he special relationship, in reality, is an expression of the courts’ satisfaction that a duty of care existed because the plaintiffs were particularly foreseeable and the injury was proximately caused by the defendant’s negligence.”¹⁰² The courts have found a special relationship to exist among a variety of persons,

⁹⁵ See *infra* notes 100–76 and accompanying text. Many courts have increasingly looked to considerations of public policy and fairness to avoid application of the physical injury rule. *People Express*, 495 A.2d at 110. Courts have also held that allowing a plaintiff to recover from an individual who has committed a wrongdoing is a more valid concern than that of protecting against threats of frivolous claims, mass litigation, and disproportionate liability. *Id.* The *People Express* court stated that “. . . we have subordinated the threat of potential baseless claims to the right of an aggrieved individual to pursue a just and fair claim for redress attributable to the wrongdoing of another.” *Id.*

⁹⁶ *Id.*

⁹⁷ See *supra* notes 48–83 and accompanying text.

⁹⁸ See *infra* notes 100–76 and accompanying text.

⁹⁹ See *infra* notes 100–76 and accompanying text.

¹⁰⁰ *People Express*, 495 A.2d at 112; Hnatt, *supra* note 21, at 1196; Mulhern, *supra* note 23, at 95.

¹⁰¹ *People Express*, 495 A.2d at 112.

¹⁰² *Id.*

including an attorney and client,¹⁰³ an auditor and stock purchaser,¹⁰⁴ a surveyor and land purchaser,¹⁰⁵ and an architect and contractor.¹⁰⁶

2. Duty, Foreseeability, and Proximate Cause

Another approach adopted by many courts to place a more liberal limit on the recovery of economic losses is the application of the theories of duty, foreseeability, and proximate cause.¹⁰⁷ While courts have applied these theories to preclude the recovery of economic losses,¹⁰⁸ they have also employed them to allow plaintiffs to recover purely economic losses, a result completely prevented by the applica-

¹⁰³ See *Lucas v. Hamm*, 364 P.2d 685, 689 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962).

¹⁰⁴ See *Rosenblum, Inc. v. Adler*, 461 A.2d 138, 140, 155 (N.J. 1983).

¹⁰⁵ See *Rozny v. Marnul*, 250 N.E.2d 656, 663 (Ill. 1969).

¹⁰⁶ See *United States v. Rogers & Rogers*, 161 F. Supp. 132, 135 (S.D. Cal. 1958).

¹⁰⁷ *People Express Airlines v. Consolidated Rail*, 495 A.2d 107, 110-12 (N.J. 1985); *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 101 (N.Y.), *reh'g denied*, 164 N.E. 564 (N.Y. 1928); *J'Aire Corp. v. Gregory*, 598 P.2d 60, 64 (Cal. 1979). ". . . [p]rinciples of duty and proximate cause are instrumental in limiting the amount of litigation and extent of liability in cases in which no physical harm occurs just as they are in cases involving physical injury." *People Express*, 495 A.2d at 110. The majority of courts impose on all people a general "duty to exercise the care of a reasonable and prudent person under the same or similar circumstances." DAN B. DOBBS, *TORTS AND COMPENSATION, PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY* 97 (1985). When a person's conduct lacks this reasonable care, that person is in breach of this duty and may be liable. *Id.* The doctrine of proximate cause is also applied by courts in an effort to limit defendants' liability for all consequences of their actions. *People Express*, 495 A.2d at 110.

The most well-known case establishing the use of the duty and proximate cause theories to limit liability is *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (1928), *reh'g denied*, 164 N.E. 564 (1928). In that case, one of the defendant's employees knocked a package of fireworks from a passenger's hands while attempting to aid that passenger onto the train. *Palsgraf*, 162 N.E. at 99. The falling package exploded and caused a scale located on the far end of the platform to fall onto and injure the plaintiff. *Id.* The New York Court of Appeals held that the plaintiff's injuries were not compensable. *Id.* at 101. The court reasoned that while the defendant may have breached his duty toward the person he pushed onto the train, he did not have a duty to exercise reasonable care towards the plaintiff who was standing many feet away. *Id.* at 100-01. The court reasoned that the defendant could not have foreseen the type of injury that occurred nor the plaintiff upon whom it was inflicted. *Id.* Rather, the defendant only had a duty to a plaintiff on whom his conduct imposed a foreseeable risk. *Id.*

¹⁰⁸ Courts have applied the theories of duty, foreseeability, and proximate cause to preclude liability for economic losses either because there was no duty owed to the plaintiff, *Mandal v. Hoffman Constr. Co.*, 527 P.2d 387, 389 (Or. 1974), or because the defendant's actions were not the proximate cause of the plaintiff's injury, *Rickards v. Sun Oil Co.*, 41 A.2d 267, 270 (N.J. 1945). In *Rickards*, the defendant's barge collided with a bridge that had enabled customers to frequent the plaintiff's retail stores. 41 A.2d at 268. The court denied recovery for economic losses because it found that an ordinary prudent person could not reasonably have foreseen that the plaintiff would incur this injury. *Id.* at 269-70. While the economic losses may have been somewhat foreseeable, the Supreme Court of New Jersey in another case, felt that the *Rickards* court's holding may be attributed to the defendant's lack of the requisite knowledge or particular foreseeability to allow for recovery. *People Express*, 495 A.2d at 117.

tion of the physical injury rule.¹⁰⁹ For example, in *People Express Airlines v. Consolidated Rail Corp.*, a chemical leak in a nearby freight yard instigated a fire which forced the plaintiff to evacuate its premises for approximately twelve hours in order to avoid the effects of a potential explosion.¹¹⁰ The New Jersey Supreme Court held that purely economic losses suffered as a result of the evacuation may be recovered despite the lack of accompanying physical injury or property damage.¹¹¹

The *People Express* court, however, limited its holding by requiring that certain conditions be met before such liability may be imposed.¹¹² The court first required that the defendant know or be able to particularly foresee that a certain class of plaintiffs would be harmed.¹¹³ To meet this requirement, the defendant must be able to particularly foresee the type of individuals or entities comprising the class, the probability of their presence at the scene of the release, and the approximate number of plaintiffs in the class.¹¹⁴ Secondly, in order to recover, the court required that the defendant's actions be the proximate cause of a particularly foreseeable injury to the plaintiff's economic interests.¹¹⁵ The court found that the railway had knowledge of the dangerous nature of the chemicals it was dealing with and should have been able to foresee the risk of harm that its conduct would cause the plaintiffs.¹¹⁶ This knowledge, as one commentator noted, instilled a duty on the defendant to act with reasonable care to avoid causing economic harm to those it should have known would suffer from its actions.¹¹⁷ Thus, the court held that the plaintiff knew or should have foreseen both the particular type of harm that its activities would impose, and the particular identifiable class of plaintiff on which such harm would be inflicted, and thus, may be held liable for the economic losses suffered by the defendants.¹¹⁸

Similarly, the California Supreme Court held that purely economic losses may be recovered in a negligence action despite the lack of accompanying physical injury or property damage.¹¹⁹ In *J'Aire Corp.*

¹⁰⁹ *People Express*, 495 A.2d at 118; *J'Aire Corp. v. Gregory*, 589 P.2d 60, 64 (Cal. 1979).

¹¹⁰ *People Express*, 495 A.2d at 118.

¹¹¹ *Id.*

¹¹² *Id.* at 116-18.

¹¹³ *Id.* at 116.

¹¹⁴ *Id.*

¹¹⁵ *Id.*; Hnatt, *supra* note 21, at 1204.

¹¹⁶ *People Express*, 495 A.2d at 118; Mulhern, *supra* note 23, at 101.

¹¹⁷ Mulhern, *supra* note 23, at 101.

¹¹⁸ *People Express*, 495 A.2d at 118.

¹¹⁹ *J'Aire Corp. v. Gregory*, 589 P.2d 60, 64 (1979).

v. Gregory, a corporate restaurant operator rented its premises from the county government.¹²⁰ The terms of the lease provided that the county would renovate the heating and air conditioning systems in the building.¹²¹ The defendant, however, did not perform the work within a reasonable time period and thereby delayed the plaintiff's operation of his restaurant and caused the loss of business profits.¹²² The court allowed the plaintiff to recover for these purely economic losses despite the lack of physical injury incurred.¹²³ The court relied on the existence of a relationship between the parties such that the defendant had a duty to perform the renovations so as to abstain from causing unnecessary injury to the plaintiff's restaurant.¹²⁴ In arriving at this holding, the court reasoned that the defendant's failure to complete the renovations within a reasonable time would foreseeably interrupt the plaintiff's business.¹²⁵

In addition, courts have used the notions of duty and foreseeability to allow for the recovery of economic losses in a pollution contamination context.¹²⁶ In *Union Oil Co. v. Oppen*, the defendant oil company released enormous quantities of crude oil into the Santa Barbara Channel causing lost profits for commercial fisherman who made their living by the Channel.¹²⁷ The Court of Appeals for the Ninth Circuit held that the defendant had a duty to use due care in its business with respect to the plaintiffs.¹²⁸ The court also found that the defendant oil company reasonably could have foreseen both the plaintiffs that would suffer from the company's activities, as well as the resultant injury that they would incur.¹²⁹

3. Direct Versus Indirect Injury

Another approach utilized by the courts to obviate the rigid physical injury rule in the pollution contamination context is to distinguish between direct and indirect injury suffered as a result of a defendant's negligent conduct. In *Pruitt v. Allied Chemical Corp.*, the United

¹²⁰ *J'Aire Corp.*, 598 P.2d at 62.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 64. "Where the risk of harm is foreseeable, as it was in the present case, an injury to the plaintiff's economic interests should not go uncompensated merely because it was unaccompanied by an injury to his person or property." *Id.*

¹²⁴ *Id.* at 63-64.

¹²⁵ *Id.* at 63.

¹²⁶ *Union Oil Co. v. Oppen*, 501 F.2d 558, 570 (9th Cir. 1974).

¹²⁷ *Id.* at 559.

¹²⁸ *Id.* at 570.

¹²⁹ *Id.* at 569.

States District Court for the Eastern District of Virginia allowed for the recovery of economic losses despite the lack of accompanying physical injury or property damage.¹³⁰ In *Allied*, the Allied Chemical Corporation disposed of a highly toxic pesticide, Kepone, into the Chesapeake Bay.¹³¹ Allied's disposal of Kepone into the Bay adversely impacted several categories of individuals, including: commercial fisherman; marina owners; boat, tackle, and bait shops; and seafood wholesalers, retailers, processors, distributors, and restaurateurs.¹³²

The court ultimately determined which plaintiffs were entitled to recover based on the directness of their relationship to the Bay.¹³³ Although the plaintiffs did not suffer any property damage, each incurred substantial economic losses that were not recoverable under the physical injury rule.¹³⁴ The court held, however, that the destruction of the Bay should not go uncompensated and that a denial of liability would not serve social utility because many direct and indirect users benefit from the Bay.¹³⁵ The court examined the relationship of the parties to the Bay and held that, while none of the plaintiffs claimed property rights to the Bay's wildlife, commercial fishermen were direct users of the Bay.¹³⁶ The fishermen's status as direct users arose out of what the court determined to be a constructive property interest in the Bay's harvestable species.¹³⁷ The fishermen were, thus, entitled to compensation for their loss of profits incurred.¹³⁸

¹³⁰ 523 F. Supp. 975, 980 (E.D. Va. 1981).

¹³¹ *Id.* at 976.

¹³² *Id.* at 976 n.1.

¹³³ *Id.* at 980.

¹³⁴ *Id.* at 976 & n.3. Under the physical injury rule, a plaintiff may not recover for economic losses unless they are accompanied by physical injury or property damage. *See supra* notes 48-83 and accompanying text.

¹³⁵ *Allied*, 523 F. Supp. at 978.

¹³⁶ *See id.* at 978.

¹³⁷ *Id.*

¹³⁸ *Id.* at 979. The fishermen were held to satisfy the test established by *Union Oil Co. v. Oppen*, that they "lawfully and directly make use of a resource of the sea." *Allied*, 523 F. Supp. at 979 & n.16. The court also sought to distinguish between plaintiffs who suffered recoverable injuries and those that did not, by determining whether holding the defendant liable would consist of double-counting damages. *Id.* at 979. For example, the seafood harvested by commercial fishermen is likely to be bought and sold many times before ultimately being sold for consumption. *Id.* The court did not, however, allow the seafood distributors and retailers to recover from the defendant. *See id.* In the interests of equity and social utility, the court held that the defendant should not be forced to pay repeatedly for the same damage. *Id.* Since the commercial fishing interests were satisfied by allowing the fisherman themselves to recover, the court held that plaintiffs who purchased and marked seafood from commercial fisherman—seafood wholesalers, retailers, processors, distributors, and restaurateurs—suffered damages too indirect to be "legally cognizable" because allowing their claims would result in double counting. *Id.* at 979-80.

The *Allied* court adopted a similar approach to compensate boat, tackle and bait shops, as well as marina owners, for their losses.¹³⁹ Unlike commercial fishermen, the court determined that the interests of sport fishermen would unlikely be served by allowing sport fishermen to recover for their economic losses because few would likely seek legal redress due to the minimal nature of their losses.¹⁴⁰ To ensure equity, the court allowed a set of "surrogate plaintiffs"—boat, tackle and bait shops and marina owners—to recover for their economic losses from the ecological damage to the Bay.¹⁴¹ These plaintiffs were held to be direct users of the Bay because of their location on the water's edge.¹⁴² The court admitted, however, that its means of distinguishing between the various plaintiffs' claims were not based on clearly reasoned analysis, but rather on equity and efficiency concerns and a desire to limit the seemingly endless number of potential plaintiffs.¹⁴³ Given these concerns, the nature of the court's analysis was arbitrary, as reflected by the court's own statement that it found itself with a "perceived need to limit liability, without any articulable reason for excluding any particular set of plaintiffs."¹⁴⁴

4. Special Injury

As in negligence cases, courts applying the common law of nuisance have also struggled to balance the competing desires of plaintiffs, who seek recovery for their economic losses, and defendants, who strive to limit their liability for unforeseeable consequences. The Massachusetts courts have achieved this balance by allowing for the recovery of purely economic losses in public nuisance cases when the plaintiff has suffered a "special injury."¹⁴⁵ A public nuisance occurs through an interference with the exercise of a public right either through affecting public property directly, or causing a "common injury."¹⁴⁶ In order for an individual plaintiff to bring a public nuisance claim, the plaintiff must prove that the public nuisance caused him or her to suffer a direct and substantial "special injury," different in kind and degree than that suffered by the general public.¹⁴⁷ When such a special injury

¹³⁹ See *id.* at 980.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 979–80.

¹⁴⁴ *Id.* at 980.

¹⁴⁵ *Connerty v. Metropolitan Dist. Comm'n*, 495 N.E.2d 840, 845 (Mass. 1986).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 845; *Stop & Shop Companies, Inc. v. Fisher*, 444 N.E.2d 368, 373 (Mass. 1983); RESTATEMENT (SECOND) OF TORTS § 821C cmt. h (1977).

is suffered, "a private plaintiff may recover for injuries caused by a public nuisance even though the injury did not involve any interference with the use of land in which the plaintiff had a property interest."¹⁴⁸

In *Stop & Shop Companies, Inc. v. Fisher*, the Massachusetts Supreme Judicial Court held that pecuniary harm caused by the obstruction of a public way was a special injury that may warrant the recovery of economic losses.¹⁴⁹ In *Stop & Shop*, the defendant's seagoing vessel negligently collided with a drawbridge, thereby closing the bridge to traffic for two months.¹⁵⁰ During the time the bridge was closed, the plaintiff experienced a substantial decline in the number of patrons that frequented its stores and, as a result, suffered economic harm in the form of lost business revenues.¹⁵¹ The Massachusetts Supreme Judicial Court held that the negligent collision of the vessel with the bridge caused an obstruction of a public way and, therefore, created a public nuisance.¹⁵²

The court, however, held that a finding of public nuisance does not automatically lead to the recovery of economic losses by the plaintiff.¹⁵³ Such losses may only be recovered when the plaintiff experienced a special harm that is different not only in degree, but in kind, from the type of harm suffered by the general public.¹⁵⁴ Thus, while the Massachusetts Supreme Judicial Court refrained from evaluating *Stop & Shop's* public nuisance claim on the merits, it held that a plaintiff may recover for purely economic harm, absent physical injury or direct loss of access to property, when the plaintiff has incurred special pecuniary harm from a substantial impairment of access that is both different in kind and degree from that suffered by the general public.¹⁵⁵

Then too, the Supreme Judicial Court of Massachusetts in *Connerty v. Metropolitan District Commission*, held that substantial harm to the plaintiff's livelihood was sufficient to constitute a special injury

¹⁴⁸ *Connerty*, 495 N.E.2d at 845.

¹⁴⁹ *Stop & Shop*, 444 N.E.2d at 372-73; see also RESTATEMENT (SECOND) OF TORTS § 821C cmt. h (1977). Other courts have also imposed liability for economic losses under a public nuisance theory absent physical injury or property damage when the "pecuniary losses suffered by those who make direct use of [a] resource are particularly foreseeable because they are so closely linked to the defendant's behavior." *People Express Airlines v. Consolidated Rail*, 495 A.2d 107, 114 (N.J. 1985).

¹⁵⁰ *Stop & Shop*, 444 N.E.2d at 369-70.

¹⁵¹ *Id.*

¹⁵² *Id.* at 371.

¹⁵³ *Id.* at 373.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 374.

not suffered by the general public so as to allow for the recovery of economic losses under a public nuisance theory.¹⁵⁶ In *Connerty*, the Metropolitan District Commission discharged raw sewage into a bay where the plaintiff, a licensed clam digger, engaged in the business of harvesting and selling clams.¹⁵⁷ The discharge of sewage resulted in the closure of the bay to shellfish harvesting and prevented the plaintiff from harvesting or selling clams.¹⁵⁸ The plaintiff suffered lost profits due to this decrease in sales and was allowed to recover for these losses from the defendant.¹⁵⁹

The Massachusetts Supreme Judicial Court, thus, has allowed for the recovery of purely economic losses arising out of public nuisances.¹⁶⁰ The court, however, requires a special injury, different in kind and degree than that suffered by the general public.¹⁶¹ Pecuniary harm, including harm to one's livelihood, or accompanied by a substantial impairment of access, meets this requirement.¹⁶² By requiring that a special injury occur before economic losses may be recovered, the court is able to award recovery for economic losses while still limiting a defendant's liability.¹⁶³

5. Strict Liability

In the area of tort-based strict liability,¹⁶⁴ the Massachusetts Supreme Judicial Court has denied recovery for economic losses when

¹⁵⁶ 495 N.E.2d 840, 845 (Mass. 1986).

¹⁵⁷ *Id.* at 841.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See *supra* notes 145-59 and accompanying text.

¹⁶¹ *Stop & Shop Companies, Inc. v. Fisher*, 444 N.E.2d 368, 373 (Mass. 1983).

¹⁶² *Id.* at 374; *Connerty*, 495 N.E.2d at 845.

¹⁶³ See *Stop & Shop*, 444 N.E.2d at 373.

¹⁶⁴ Under a strict liability theory, liability is imposed without regard to fault or negligence. *Clark-Aiken Co. v. Cromwell Wright Co.*, 323 N.E.2d 876, 885 (Mass. 1975). Strict liability is based on the theory that those who undertake to engage in certain activities must pay for any damage that the activity causes, even if the activity was conducted with the utmost care. RESTATEMENT (SECOND) OF TORTS § 519(1) (1976). To be held strictly liable under the common law, a defendant must have engaged in an abnormally dangerous activity that caused personal injury or property damage, and the damage must have been a consequence of the risk created by the defendant's activity. *Clark-Aiken*, 323 N.E.2d at 886; RESTATEMENT (SECOND) OF TORTS § 519 cmt. e (1976).

In determining whether an activity is abnormally dangerous, the following factors are to be considered: (a) existence of a high degree of risk of some harm to the person, land or chattel of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.

RESTATEMENT (SECOND) OF TORTS § 520 (1976).

the losses are not accompanied by physical injury or property damage.¹⁶⁵ This view, however, has been reexamined and overruled in other states which have sought to eradicate the unfairness of this rule in the strict liability context.¹⁶⁶

While there is currently a divergence of views, some courts allow for the recovery of purely economic losses under a strict liability theory.¹⁶⁷ The leading case reaching this result is *Santor v. A & M Karagheusian, Inc.*¹⁶⁸ In *Santor*, the plaintiff purchased a defective carpet manufactured by the defendant.¹⁶⁹ The plaintiff then sued the defendant manufacturer under a theory of breach of an implied warranty of merchantability.¹⁷⁰ The New Jersey Supreme Court noted, however, that the liability of the manufacturer could also have been based on strict liability in tort.¹⁷¹ The court reasoned that when a manufacturer such as the defendant places his products in the market for sale, he represents that they are safe and suitable for use.¹⁷² Thus, the manufacturer has a duty independent from the intricacies of the law of sales.¹⁷³ The court concluded that although the recovery of purely economic losses has been applied only when users of products sustained physical injuries, the manufacturer's responsibility should be the same when no such physical injury has occurred.¹⁷⁴ While this is apparently the "minority view,"¹⁷⁵ other courts have also allowed for the recovery of purely economic losses under a strict liability theory.¹⁷⁶

¹⁶⁵ *Garweth Corp. v. Boston Edison Co.*, 613 N.E.2d 92, 93 (Mass. 1993); *Bay State-Spray & Provincetown Steamship, Inc. v. Caterpillar Tractor Co.*, 533 N.E.2d 1350, 1353 (Mass. 1989).

¹⁶⁶ *Santor v. A & M Karagheusian, Inc.*, 207 A.2d 305, 312-14 (N.J. 1965); Christopher C. Fallon, Jr., *Physical Injury and Economic Loss—The Fine Line of Distinction Made Clearer*, 27 VILL. L. REV. 483, 488 (1981-82).

¹⁶⁷ New Jersey allowed for the recovery of purely economic losses under a strict liability tort concept when the plaintiff bought a carpet manufactured by the defendant which turned out to be defective. *Santor*, 207 A.2d at 307, 312-14. The Supreme Court of California, however, held that purely economic losses may not be recovered under a theory of strict liability in tort when the plaintiff purchased a truck manufactured by the defendant that overturned due to a defect in the brakes. *Seely v. White Motor Co.*, 403 P.2d 145, 150-51 (Cal. 1965).

¹⁶⁸ 207 A.2d 305 (N.J. 1965).

¹⁶⁹ *Id.* at 306.

¹⁷⁰ *Id.* at 307.

¹⁷¹ *Id.* at 311.

¹⁷² *Id.*

¹⁷³ *Id.* at 311-12.

¹⁷⁴ *Id.* at 312.

¹⁷⁵ Kurt M. Rupert, *Torts: Recovery of Damages for Economic Loss Through the Use of Strict Liability in Tort*, 38 OKL. L. REV. 347, 350 (1985).

¹⁷⁶ *Id.* at 350 & n.25; *Mead Corp. v. Allendale Mut. Ins. Co.*, 465 F. Supp. 355, 366 (N.D. Ohio 1979); *Blagg v. Fred Hunt Co.*, 612 S.W.2d 321, 323, 324 (Ark. 1981); *Verdon v. Transamerica Ins. Co.*, 446 A.2d 3, 8 (Conn. 1982); *Cova v. Harley Davidson Motor Co.*, 182 N.W.2d 800, 808-11 (Mich. Ct. App. 1970); *City of LaCrosse v. Schubert, Schroeder & Assoc., Inc.*, 240 N.W.2d 124, 127 (Wis. 1976).

B. Statutory Schemes

1. CERCLA

CERCLA does not provide for the recovery of purely economic losses.¹⁷⁷ CERCLA was enacted as a response to the increasing problems of hazardous substance releases.¹⁷⁸ The statute was primarily designed to "facilitate government cleanup of hazardous waste discharge and impede future releases in order to prevent, minimize, or mitigate damage to the public health, welfare, and to the environment."¹⁷⁹ CERCLA was also enacted to provide funds to pay for pollution abatement costs at those sites that are the most severely contaminated with hazardous waste.¹⁸⁰ The statute creates a trust fund called the "Superfund," that is financed through excise taxes, and used to pay for clean-up programs.¹⁸¹ CERCLA provides that federal and state governments, as well as private parties may recover for their incurred response costs as long as their response actions comply with the established guidelines of the Environmental Protection Agency's (EPA) National Contingency Plan.¹⁸² In addition, each party engaging in a response action may sue those responsible for the generation, transportation or disposal of the hazardous wastes.¹⁸³

The courts interpreting CERCLA have consistently held that purely economic losses are not recoverable under the statute's hazardous waste liability scheme.¹⁸⁴ For example, one court held that

¹⁷⁷ 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1991); *Artesian Water Co. v. Governor of New Castle County*, 659 F. Supp. 1269, 1285-86 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988) (citing S. 1480, 96th Cong., 2d Sess. § 4(a)(2)(A)-(G)).

¹⁷⁸ *Artesian Water*, 659 F. Supp. at 1276; *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1150 (1st Cir.), *reh'g denied*, 1989 U.S. App. LEXIS 18801 (1st Cir. 1989).

¹⁷⁹ *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1237 (M.D. Pa. 1990).

¹⁸⁰ ZYGMUNT J.B. PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 252 (1992).

¹⁸¹ *Exxon Corp. v. Hunt*, 475 U.S. 355, 359 (1986); *Artesian Water*, 659 F. Supp. at 1277. The government may use money from the Superfund to "finance governmental response activities, to pay claims arising from the response activities of private parties, and to compensate federal or state governmental entities for damage caused to natural resources." *Artesian Water*, 659 F. Supp. at 1277; 42 U.S.C. § 9611(a) (1988 & Supp. III 1991).

¹⁸² 42 U.S.C. §§ 9606, 9607(a)(4)(A)-(B) (1988 & Supp. III 1991); *Artesian Water*, 659 F. Supp. at 1278; *Ambrogi*, 750 F. Supp. at 1238. The National Contingency Plan is promulgated pursuant to 42 U.S.C. § 9605 (1988 & Supp. III 1991) and "establishes procedures, criteria, and responsibilities for conducting response actions at Superfund sites." 42 U.S.C. § 9605.

¹⁸³ 42 U.S.C. § 9607(a) (1988); *Artesian Water*, 659 F. Supp. at 1277. Response costs include both removal and short term cleanup as well as remedial measures. 42 U.S.C. § 9601(25) (1988); *Ambrogi*, 750 F. Supp. at 1240; *Artesian Water*, 659 F. Supp. at 1277.

¹⁸⁴ Cases interpreting CERCLA have held that the Superfund is not to be used to compensate private parties for their economic losses caused by the release of hazardous substances. *Artesian*

"Superfund money [is not] available to compensate private parties for economic harms that result from discharges of hazardous substances."¹⁸⁵ Similarly, another court stated that, "Congress did not intend CERCLA to be utilized as a means to recover 'economic loss' for civil damages that a private party may seek as part of a toxic tort action."¹⁸⁶ In *Artesian Water Co. v. Governor of New Castle County*, the United States District Court for the District of Delaware stated that it is evident from the legislative history of CERCLA that the legislature specifically intended to deny recovery for economic losses resulting from the release of hazardous wastes.¹⁸⁷ The original Senate bill, S. 1480, included a private cause of action for damages for economic losses resulting from a discharge of hazardous substances.¹⁸⁸ Yet, at the last minute, because of a political compromise, the Senate deleted this provision.¹⁸⁹ The *Artesian Water* court held that this was clear evidence that Congress did not intend to provide for economic losses resulting from the release of hazardous wastes.¹⁹⁰

Water, 659 F. Supp. at 1286 (plaintiff's private claim for idling of property and equipment after pumping restrictions were imposed on its wells was a claim for economic loss and thus, not recoverable under CERCLA); *Ambrogio*, 750 F. Supp. at 1250 (the District Court for the District of Pennsylvania held plaintiff's loss of beneficial use of property was economic loss and, as such, not recoverable under CERCLA); *Wehner v. Syntex Corp.*, 681 F. Supp. 651, 653 (N.D. Cal. 1987) (court held plaintiff's diminished value of property due to dioxin contamination was economic loss and thus, not recoverable as response cost under CERCLA); *Piccolini v. Simon's Wrecking*, 686 F. Supp. 1063, 1068 (M.D. Pa. 1988) (plaintiff's claim for damages due to diminished property value and lost income are not recoverable under CERCLA); *Exxon v. Hunt*, 475 U.S. 335, 359 (1986) (private party claims for economic harms due to environmental contamination are not recoverable under CERCLA).

¹⁸⁵ *Exxon*, 475 U.S. at 359.

¹⁸⁶ *Ambrogio*, 750 F. Supp. at 1248.

¹⁸⁷ *Artesian Water*, 659 F. Supp. at 1285.

¹⁸⁸ *Id.* at 1285-86 (citing S. 1480, 96th Cong., 2d Sess. § 4(a)(2)(A)-(G)). The original Senate bill created a private cause of action for:

all damages for economic loss or loss due to personal injury or loss of natural resources resulting from such a discharge, release, or disposal, including: (A) any injury to, destruction of, or loss of any real or personal property, including relocation costs; (B) any loss of use of real or personal property; (C) any injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss; (D) any loss of use of any natural resources, without regard to the ownership or management of such resources; (E) any loss of income or profits or impairment of earning capacity resulting from personal injury or from injury to or destruction of real or personal property or natural resources, without regard to the ownership of such property or resources; (F) all out-of-pocket medical expenses, including rehabilitation costs or burial expenses, due to personal injury; and (G) any direct or indirect loss of tax, royalty, rental, or net profits share revenue by the Federal Government or any State or political subdivision thereof, for a period of not to exceed one year.

Id.

¹⁸⁹ *Id.* at 1286.

¹⁹⁰ *Id.* at 1285-86. In *Artesian*, the plaintiff water company claimed \$600,000 of response costs

Thus, while CERCLA was enacted to alleviate the problems of hazardous waste contamination, it does not live up to the all-inclusive scheme of liability that it was originally proposed to effectuate.¹⁹¹ This is because CERCLA was not enacted to regulate all aspects of hazardous waste, nor is it capable of cleaning up all such contaminated sites.¹⁹² The purpose of CERCLA is somewhat restrictive in that it is not intended "to make injured parties whole or to create a general vehicle for toxic tort actions."¹⁹³ Rather, CERCLA is designed to ensure that the Superfund is used in a "cost-effective and environmentally sound manner."¹⁹⁴

Due to CERCLA's lack of a comprehensive regulatory structure, the statute envisions and encourages state participation in its clean-up scheme.¹⁹⁵ CERCLA not only requires state matching grants before providing funds for federal clean-up projects, but also allows for federal reimbursement to states that use their own authority to respond to releases.¹⁹⁶ CERCLA allows states to conduct federal response actions or to manage their own clean-up actions, provided they yield to "federal guidance or control."¹⁹⁷ After expending funds for clean-up actions, states may recoup these funds from responsible private parties or from the Superfund.¹⁹⁸

In keeping with CERCLA's vision of cooperative state and federal action to abate hazardous waste sites, CERCLA's three substantive programs each elicit state participation.¹⁹⁹ The first substantive program involves response actions.²⁰⁰ This program instills both federal and state governments with the necessary authority to conduct clean-

when pumping restrictions were imposed on its wells so as to prevent the company from using its equipment and property. *Id.* at 1287.

¹⁹¹ Warren, *supra* note 14, at 10,348. The Superfund was decreased so that it could not possibly deal efficiently with the exorbitant cost of abating hazardous waste sites around the country. *Id.* In addition, the final version of CERCLA lacks the originally proposed provisions that would provide compensation to third party victims and comprehensive liability for damages and waste cleanup. *Id.*

¹⁹² *Exxon v. Hunt*, 475 U.S. 355, 359 (1986). "The statute is not to be used, however, as a universal solution to all ills that originate from a hazardous waste site . . ."; Warren, *supra* note 14, at 10,348.

¹⁹³ *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1238 (M.D. Pa. 1990).

¹⁹⁴ *Id.* Thus, private plaintiffs may recover only for recovery actions that were "necessary costs of response . . . consistent with the National Contingency Plan." *Id.* at 1238-39 (citing 42 U.S.C. § 9607(a)(4)(B) (1988)).

¹⁹⁵ Warren, *supra* note 14, at 10,348.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ 42 U.S.C. § 9604 (1988).

up efforts on sites contaminated with hazardous waste.²⁰¹ In addition, it requires the EPA, in conjunction with the states, to construct a National Contingency Plan.²⁰² The response actions described by CERCLA not only permit, but mandate state participation.²⁰³ CERCLA requires “state-federal consultation, makes state action and financial contribution a prerequisite to some federal response actions, and allows states to use federal response authority if they will satisfy all the conditions for federal action.”²⁰⁴

CERCLA’s second substantive program involving state participation addresses who may be liable for response costs and damages, as well as the scope and apportionment of their liability.²⁰⁵ CERCLA defines responsible parties as owners or operators of hazardous substance dumps that are releasing waste, and generators and transporters of waste to a problem site.²⁰⁶ While states may be responsible parties under this program,²⁰⁷ any necessary response costs incurred by the states during response actions taken consistent with the National Contingency Plan are compensable by those responsible for the release.²⁰⁸ In addition, responsible parties are liable for response costs, as well as natural resource damages.²⁰⁹

The final substantive program is the Superfund created by CERCLA to provide funds for federal response actions, as well as other actions taken by those, including states, who engage in proper response measures.²¹⁰ To receive funds, however, states must satisfactorily act within the EPA’s National Contingency Plan²¹¹—a plan which designs procedures, criteria, and responsibilities to be followed by a party conducting response actions at a Superfund site.²¹²

While CERCLA envisions cooperative state and federal implementation of environmental cleanup, it has also given states the flexibility

²⁰¹ 42 U.S.C. § 9604; Warren, *supra* note 14, at 10,348.

²⁰² 42 U.S.C. § 9605 (1988 & Supp. III 1991); Warren, *supra* note 14, at 10,348; *see supra* note 182.

²⁰³ 42 U.S.C. § 9605; Warren, *supra* note 14, at 10,348.

²⁰⁴ Warren, *supra* note 14, at 10,348; 42 U.S.C. § 9604.

²⁰⁵ 42 U.S.C. § 9607 (1988 & Supp. III 1991); Warren, *supra* note 14, at 10,348.

²⁰⁶ 42 U.S.C. § 9607(a) (1988); Warren, *supra* note 14, at 10,348.

²⁰⁷ 42 U.S.C. § 9607 making persons liable and 42 U.S.C. § 9601(21) (1988) defining “person” to include states. Warren, *supra* note 14, at 10,348.

²⁰⁸ 42 U.S.C. § 9607(a)(4)(B) (1988); Warren, *supra* note 14, at 10,348.

²⁰⁹ 42 U.S.C. § 9607(a); Warren, *supra* note 14, at 10,348.

²¹⁰ “Superfund” stands for the “Hazardous Substance Response Trust Fund” created by CERCLA. 42 U.S.C. § 9631 (1988); Warren, *supra* note 14, at 10,348.

²¹¹ 42 U.S.C. § 9611(a)(2) (1988); Warren, *supra* note 14, at 10,348.

²¹² 42 U.S.C. § 9605 (1988 & Supp. III 1991); *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1238 (M.D. Pa. 1990).

to design and adopt their own hazardous waste legislation.²¹³ In fact, "CERCLA appears to leave the states opportunities to fashion Superfund programs either similar to or different from the federal scheme."²¹⁴ CERCLA is a narrowly devised statute that is not meant to make the injured parties whole, and until Congress seeks to do so, "full compensation for hazardous waste harms will in most instances remain the province of state law."²¹⁵ Thus, an inquiry into state hazardous waste statutes is necessary to understand the overall hazardous waste clean-up scheme.

2. State Statutes

Although CERCLA does not allow for the recovery of economic losses, it opens the door for states to provide for the recovery of these losses.²¹⁶ In fact many state Superfund statutes differ from CERCLA in this respect and are, thereby, "leading the way in developing new approaches to the hazardous waste clean-up problem."²¹⁷ Given CERCLA's limited scope, the statute encourages state and federal cooperation in implementing its provisions and provides states with wide discretion in developing their own pollution abatement statutes.²¹⁸ While some states' statutes parallel CERCLA, others exceed the scope of CERCLA in several areas including the recovery of economic losses.²¹⁹ The Minnesota Environmental Response Liability Act (MERLA) and the New Jersey Spill Compensation and Control Act are two such statutes that provide for the recovery of economic losses from responsible parties, by those assessed with hazardous waste clean-up costs.²²⁰

The Minnesota Superfund statute has one of the most intricate private damage liability structures of all state Superfund statutes.²²¹ MERLA explicitly provides for statutory liability not only for per-

²¹³ Warren, *supra* note 14, at 10,348. CERCLA does not provide for comprehensive mandatory procedures for states to follow. Rather they are given broad discretion to shape their own legislation. *Id.*

²¹⁴ Warren, *supra* note 14, at 10,348.

²¹⁵ *Artesian Water Co. v. Governor of New Castle County*, 659 F. Supp. 1269, 1299-1300 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988).

²¹⁶ *See Versatile Metals Inc. v. Union Corp.*, 693 F. Supp. 1563, 1582-83 (E.D. Pa. 1988); Warren, *supra* note 14, at 10,348.

²¹⁷ Warren, *supra* note 14, at 10,348.

²¹⁸ *Id.*

²¹⁹ MINN. STAT. § 115B.05 (1987); N.J. STAT. ANN. § 58:10-23.11g (West 1992).

²²⁰ MINN. STAT. § 115B.05 (1987); N.J. STAT. ANN. § 58:10-23.11g (West 1992).

²²¹ Warren, *supra* note 14, at 10,348.

sonal injury, but for economic losses as well.²²² Economic losses under MERLA include injury, loss of use, or loss of past or future profits due to injury to real or personal property.²²³ Interpreting this statute, the United States District Court for the District of Minnesota in *Norwest Financial Leasing v. Morgan Whitney*, held that MERLA not only allows for the recovery of sustained economic losses but also for the recovery of future economic losses resulting from hazardous waste contamination.²²⁴ In *Norwest Financial Leasing*, the defendant sold property that was later determined to be contaminated.²²⁵ Norwest Financial was the assignee of a promissory note, mortgage, and rent and lease assignments on the sold property.²²⁶ The court held that Norwest Financial was entitled to recover for economic losses, in the form of diminution in the value of its collateral, from the seller of the contaminated property.²²⁷

The New Jersey Spill Compensation and Control Act (NJSCCA) also reaches beyond its federal counterpart by committing its statutorily created fund to compensate specified parties for "all direct and indirect damages."²²⁸ While the statute has many purposes, one of its

²²² *Id.* at 10,348; MINN. STAT. § 115B.05(1)(a)(3) (1987).

²²³ MINN. STAT. § 115B.05(1)(a)(1)–(3) (1987). Section 115B.05 states that:

... any person who is responsible for the release of a hazardous substance from a facility is strictly liable for the following damages which result from the release or to which the release significantly contributes: (a) all damages for actual economic loss including: (1) any injury to, destruction of, or loss of any real or personal property, including relocation costs; (2) any loss of use of real or personal property; (3) any loss of past or future income or profits resulting from injury to, destruction of, or loss of real or personal property without regard to the ownership of the property.

Id.

²²⁴ 787 F. Supp. 895, 902 (D. Minn. 1992); MINN. STAT. § 115B.05(1)(a)(3) (1987).

²²⁵ *Norwest Financial Leasing*, 787 F. Supp. at 897.

²²⁶ *Id.*

²²⁷ *Id.* at 902–03.

²²⁸ N.J. STAT. ANN. § 58:10–23.11g(a) (West 1992). The compensation for third-party economic loss is very broad under the statute. *Exxon Corp. v. Hunt*, 475 U.S. 355, 358 n.1 (1986). The New Jersey statute creates a fund similar to the Superfund and provides that:

[t]he fund shall be strictly liable, without regard to fault, for all cleanup and removal costs and for all direct and indirect damages no matter by whom sustained, including but not limited to: (1) the cost of restoring, repairing, or replacing any real or personal property damaged or destroyed by a discharge, any income lost from the time such property is damaged to the time such property is restored, repaired or replaced, and any reduction in value of such property caused by such discharge by comparison with its value prior thereto; (2) the cost of restoration and replacement, where possible, of any natural resource damaged or destroyed by a discharge; (3) the loss of income or impairment of earning capacity due to damage to real or personal property . . . ; (4) loss of tax revenue by the State or local governments for a period of 1 year due to damage to real or personal property proximately resulting from a discharge; (5) interest on loans obtained or other obligations incurred by a claimant for the purpose of amelio-

main goals is to compensate third parties for economic losses resulting from hazardous waste discharges.²²⁹ Section 11g(a)(3) of the NJSCCA allows one to sue the fund for "loss of income or impairment of earning capacity due to damage to real or personal property . . . destroyed or damaged by a discharge" ²³⁰ In *City of Newark v. Block 183*, the New Jersey Superior Court interpreted this statute to allow a taxpayer to recover from the New Jersey Spill fund his loss of rental income due to a hazardous waste discharge.²³¹

New Jersey and Minnesota, thus, have taken the initiative provided by CERCLA to enact hazardous waste abatement statutes whose liability schemes reach beyond that of their federal counterpart.²³² These states have exercised their discretion to enact broader liability schemes by explicitly allowing for the recovery of economic losses caused by a release or discharge of hazardous waste.²³³ Thus, state statutes, as well as the common law, have rejected the physical injury rule and have provided for the recovery of purely economic losses in many circumstances.

3. Chapter 21E

In 1983 the Massachusetts Legislature enacted Massachusetts General Law chapter 21E, modeled after CERCLA.²³⁴ As chapter 21E is primarily based on CERCLA, many of the two statutes' provisions are similar.²³⁵ Despite these similarities, however, the two statutes are not identical.²³⁶ As opposed to CERCLA, chapter 21E contains more expansive coverage through its application to oil and hazardous waste releases, and it provides for a more comprehensive liability scheme through its allowance for the recovery of damages to real or personal property, as well as for response costs.²³⁷

rating the adverse effects of a discharge pending the payment of a claim in full as provided by this act.

N.J. STAT. ANN. § 58:10-23.11g (West 1992).

²²⁹ N.J. STAT. ANN. § 58:10-23.11o (West 1992 & Supp. 1993); *Exxon*, 475 U.S. at 358.

²³⁰ N.J. STAT. ANN. § 58:10-23.11g(a)(3) (West 1992).

²³¹ *City of Newark v. Block*, 537 A.2d 1311, 1313 (N.J. Super. Ct. App. Div. 1988).

²³² MINN. STAT. § 115B.05 (1987); N.J. STAT. ANN. § 23.11g (West 1992).

²³³ MINN. STAT. § 115B.05 (1987); N.J. STAT. ANN. § 23.11g (West 1992).

²³⁴ *Griffith v. New England Tel. & Tel. Co.*, 585 N.E.2d 751, 753 (Mass. App. Ct. 1992), *rev'd on other grounds*, 610 N.E.2d 944 (Mass. 1993); *Dedham Water Co. v. Cumberland Farms Dairy*, 889 F.2d 1146, 1156 (1st Cir.), *reh'g denied*, 1989 U.S. App. LEXIS 18801 (1st Cir. 1989); *Sheehy v. Lipton Indus., Inc.*, 507 N.E.2d 781, 786 (Mass. App. Ct.), *review denied*, 509 N.E.2d 1202 (Mass. 1987); Breckenridge, *supra* note 15, at 19.

²³⁵ *Griffith v. New England Tel. & Tel. Co.*, 610 N.E.2d 944, 946 (Mass. 1993).

²³⁶ Breckenridge, *supra* note 15, at 19.

²³⁷ MASS. GEN. L. ch. 21E, § 5(a)(1) (1992) (" . . . the owner or operator of a vessel or a site

Chapter 21E was enacted to provide the Commonwealth with a means of promptly and effectively responding to oil and hazardous waste releases.²³⁸ It was also designed to ensure that the Commonwealth could recover its costs from parties responsible for those releases either because they own or owned the contaminated land or because they caused the release.²³⁹ In keeping with these purposes, chapter 21E provides for the investigation and cleanup of contaminated sites and imposes strict, joint and several liability on a variety of responsible parties.²⁴⁰ Chapter 21E also provides private parties with a means to bring suit against these responsible parties for the recovery of their response costs,²⁴¹ as well as for property damage

from or at which there is or has been a release or threat of release of oil”; § 5(a)(5) (“ . . . any person who otherwise caused or is legally responsible for a release or threat of release of oil”); § 5(a)(5)(iii) (“ . . . to any person for damage to his real or personal property”); see also 42 U.S.C. § 9601(14), (33) (1988) (excludes crude oil and petroleum from scope of CERCLA). Breckenridge, *supra* note 15, at 19 (CERCLA and 21E liability provisions differ in some respects).

²³⁸ *Acme Laundry Co. v. Secretary of Env'tl. Affairs*, 575 N.E.2d 1086, 1089 (Mass. 1991).

²³⁹ *Id.*; *Garweth Corp. v. Boston Edison Co.*, 613 N.E.2d 92, 95 (Mass. 1993) (citing *Nassr v. Commonwealth*, 477 N.E.2d 987, 991–92 (Mass. 1985) (quoting St. 1983, c. 7, emergency preamble)). “General Laws ch. 21E was enacted to clarify and improve the Commonwealth’s capability for responding to releases of oil and hazardous material and to recover response costs from persons responsible for releases for which it has incurred such costs.” *Garweth*, 613 N.E.2d at 95.

²⁴⁰ MASS. GEN. L. ch. 21E, §§ 4, 5 (1992). *Rosenblatt & Floyd*, *supra* note 1, at 1507. Under chapter 21E, § 5, responsible parties include:

(1) the owner or operator of a vessel or a site from or at which there is or has been a release or threat of release of oil or hazardous material; (2) any person who at the time of storage or disposal of any hazardous material owned or operated any site at or upon which such hazardous material was stored or disposed of and from which there is or has been a release or threat of release of hazardous material; (3) any person who by contract, agreement, or otherwise directly or indirectly, arranged for the transport, disposal, storage or treatment of hazardous material to or in a site or vessel from or at which there is or has been a release or threat of release of hazardous material; (4) any person who, directly or indirectly, transported any hazardous material to transport, disposal, storage or treatment vessels or sites from or at which there is or has been a release or threat of release of such material; and (5) any person who otherwise caused or is legally responsible for a release or threat of release of oil or hazardous material from a vessel or site.

ch. 21E, § 5.

²⁴¹ ch. 21E, § 4. Private parties may recover the reasonable costs of assessment, containment and removal actions. *Id.* Assessment costs refer to those expenses incurred in gathering information to identify the existence, source, nature and extent of the hazardous waste or oil release, the extent of the danger to the public safety, and the parties responsible for the release. ch. 21E, § 2. Containment expenses are the costs of actions taken to prevent or minimize hazardous material or oil releases so that they do not cause significant danger to the public health, safety, welfare or the environment. *Id.* Removal costs are incurred through cleanup of released oil or hazardous materials from the environment, the disposal of the removed oil and any other actions necessary to prevent, minimize or mitigate damage to public health, safety, welfare or the environment that may result from a release of hazardous substances. *Id.*

sustained because of a hazardous waste release.²⁴² It is unclear, however, given the language of the statute, whether it provides for the recovery of purely economic losses.²⁴³

a. Recoverable Losses Under Chapter 21E

It is important to determine whether businesses may recover for their economic losses under chapter 21E because the statute imposes strict liability on those responsible for hazardous waste or oil releases.²⁴⁴ Thus, any party that is a current or former owner or operator of a contaminated site, or who arranged for the transport, disposal, storage or treatment of hazardous materials, or who otherwise caused a release, is held strictly, jointly and severally liable for the resulting damages.²⁴⁵ The standard of proof under chapter 21E's strict liability scheme thus, is significantly lower than the proof of culpable or responsible conduct required under common law tort theories.²⁴⁶

Until the recent Massachusetts Supreme Judicial Court's decision in *Garweth Corp. v. Boston Edison Co.*, no Massachusetts cases addressed whether a plaintiff may recover for economic losses under chapter 21E.²⁴⁷ Only the statute itself served as a guide to interpreting this issue. The first section of chapter 21E which addresses the recovery of economic losses is § 4 which creates a private right of action authorizing any party who "undertakes assessment, containment, or removal action[s]" to recover its related expenses from the party responsible for the hazardous waste contamination.²⁴⁸ Under § 4, however, the injured party may only recover costs related to assessment, containment, and removal of the contamination.²⁴⁹ The clean-up and response costs recoverable under § 4 of the statute do not include economic losses such as lost profits and business interruption losses.²⁵⁰

The Massachusetts Legislature did recognize, however, that economic losses may be incurred in responses to contamination.²⁵¹ Section 4 of chapter 21E provides that "any person . . . who provides care, assistance or advice in response to a release or threat of release of oil

²⁴² ch. 21E, § 5(a)(5)(iii).

²⁴³ See *id.*

²⁴⁴ ch. 21E, § 5; Rosenblatt & Floyd, *supra* note 1, at 1507.

²⁴⁵ ch. 21E, § 5.

²⁴⁶ Rosenblatt & Floyd, *supra* note 1, at 1507.

²⁴⁷ 613 N.E.2d 92 (Mass. 1993).

²⁴⁸ ch. 21E, § 4.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

into or onto the tidal waters of the United States . . . and such care, assistance or advice is consistent with applicable state law, or the National Contingency Plan . . . shall not be liable, . . . , for removal costs or damages which result from actions taken or omitted to be taken in the course of providing such care, assistance, or advice”²⁵² Section 4 then defines damages, for the purposes of these persons, as including “economic loss of any kind for which liability may exist under the laws of this state resulting from, arising out of or related to the discharge or threatened discharge of oil.”²⁵³

The only remaining means, beyond § 4, through which a business may recover economic losses is by showing that these losses are provided for in § 5 of chapter 21E.²⁵⁴ Section 5 of chapter 21E states that “any person who otherwise caused or is legally responsible for a release or threat of release of oil or hazardous material . . . shall be liable, without regard to fault, . . . to any person for damage to his real or personal property incurred or suffered as a result of such release or threat of release [S]uch liability shall be joint and several.”²⁵⁵ In order for a business to recover economic losses under § 5, it must prove that these losses are damages to “personal property.”²⁵⁶ The statute, however, does not define personal property and it is, therefore, unclear whether economic losses may be recovered under this provision.²⁵⁷ Very little legislative history regarding chapter 21E exists, and none explains whether the legislature intended economic losses to be recovered under § 5.²⁵⁸ Since this phrase is the key to the recovery of purely economic losses under chapter 21E, it is important to understand what the Massachusetts Legislature intended to in-

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ ch. 21E, § 5.

²⁵⁵ ch. 21E, § 5(a)(5)(iii).

²⁵⁶ ch. 21E, § 5.

²⁵⁷ See generally ch. 21E, §§ 1–18; ch. 21E, § 5(a)(5)(iii).

²⁵⁸ Robert D. Cox, Jr. & Barry A. Bachrach, *Damages for Contaminated Property*, BOSTON B. J., July/Aug. 1993, at 19 & n.4. Since 1983, chapter 21E has experienced eight different revisions and has yet to define damages to “personal property.” *Id.* Another possible means by which businesses may recover economic losses in environmental cases in Massachusetts is under chapter 93A. MASS. GEN. LAWS ANN. ch. 93A, § 2 (West 1984 & Supp. 1993). Rosenblatt & Floyd, *supra* note 1, at 1507. Chapter 93A prohibits the unfair and deceptive acts or practices by businesses. ch. 93A, § 2. Under the broad remedial purpose of the statute, anyone who discloses only partial information that is misleading, has a duty to reveal all the material facts he is aware of in order to avoid deceiving the other party. V.S.H. Realty, Inc. v. Texaco, Inc., 757 F.2d 411, 414 (1st Cir. 1985). In disallowing unfair practices, the statute also allows for the recovery of economic damages including lost profits and other pecuniary losses. *Id.*; Rosenblatt & Floyd, *supra* note 1, at 1507.

clude within the term "personal property." This may be accomplished by examining how Massachusetts, as well as other courts, legislatures, and commentators have defined the term.

b. Personal Property

The term "personal property" is not typically defined by courts, legislatures, or commentators in one, easily understandable fashion, but is subject to a variety of definitions and explanations.²⁵⁹ In general, real property is defined as property in land, and in the theoretically permanent attachments to land, such as houses, barns and buildings.²⁶⁰ Personal property is then defined as "all other things which are subject to individual rights, whether they be tangible [like chattels] or intangible."²⁶¹

The variations on the definitions of personal property, however, are many. Personal property has been defined as all objects and rights, tangible or intangible, that are the subject of ownership.²⁶² Then too, personal property has been defined as all things that are the subject of ownership that are not real estate, such as goods, chattels, money, notes, bonds, stocks, and choses in action.²⁶³ Personal property has also been defined as intangible property, or "property which cannot be touched because it has no physical existence such as claims, interests and rights."²⁶⁴

Statutes often specify which items are to be included within the category personal property.²⁶⁵ Some statutes include a broad range of items, such as goods, chattels, choses in action, evidences of debt, and money.²⁶⁶ Other objects and rights often defined by statutes to com-

²⁵⁹ See *infra* notes 260-70 and accompanying text.

²⁶⁰ ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 1.4, at 12 (West 1984); JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* § 1, at 9 (3d ed. 1989).

²⁶¹ CRIBBET & JOHNSON, *supra* note 260, § 1 at 9.

²⁶² 63A AM. JUR. 2D *Property* § 21 (1984). The right of a creditor to be paid, for example, has been held to qualify as personal property. *Id.* § 25.

²⁶³ BLACK'S LAW DICTIONARY 1217 (6th ed. 1990).

²⁶⁴ *Id.*

²⁶⁵ 63A AM. JUR. 2D *Property* § 21 (1984).

²⁶⁶ *Id.* § 21 & n.70; see also *Board of Com'rs v. Leonard*, 46 P. 960, 960 (Kan. 1896) (personal property included "every tangible thing which is the subject of ownership, not forming part or parcel of real property; also, all tax-sale certificates, judgments, notes, bonds and mortgages, . . . capital stock, . . . share or interest in such stock, . . . share or interest in any vessel . . ."); *Re Jones' Estate*, 65 N.E. 570, 573 (N.Y. 1902) (personal property included "chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien, or encumbrance in, to, or upon property, or any debt or financial obligation, is created acknowledged, evidenced, transferred,

prise intangible personal property include "claims represented by bank accounts, promissory notes, corporate and government bonds, shares of corporate stock, life insurance policies, and annuities, as well as patents, copyrights, trademarks, and even the 'goodwill' of business enterprises."²⁶⁷ In addition, the Massachusetts Supreme Judicial Court held that intangible personal property included contractual obligations.²⁶⁸

On the other hand, some statutes narrowly define personal property to include only chattels or tangible property and to exclude incorporeal rights.²⁶⁹ These statutes often use qualifying language such as "tangible" to limit the meaning of personal property within the context of the statute.²⁷⁰

IV. MASSACHUSETTS SUPREME JUDICIAL COURT'S DENIAL OF RECOVERY FOR ECONOMIC LOSSES UNDER CHAPTER 21E

A. *Garweth Corp. v. Boston Edison Co.*

Despite the trends in the common law and state statutory schemes, the Massachusetts Supreme Judicial Court comprehensively addressed the issue of the recovery of purely economic losses under chapter 21E and held that personal property, as used in § 5, referred only to tangible personal property and, thus, did not include purely economic losses.²⁷¹ In *Garweth Corp. v. Boston Edison Co.*, Garweth sought to recover damages allegedly caused by Boston Edison due to a release of fuel oil while Garweth was performing a contract with the Boston Water and Sewer Commission (BWSC).²⁷² The oil leak, emanating from a Boston Edison facility, migrated to areas where Garweth was performing construction work for the BWSC.²⁷³ Boston Edison then hired Clean Harbors, Inc. (CHI) to clean up the release.²⁷⁴

discharged, or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership.").

²⁶⁷ CUNNINGHAM, *supra* note 260, § 1.4 at 12.

²⁶⁸ *Treasurer and Receiver General v. John Hancock Mutual Life Ins. Co.*, 446 N.E.2d 1376, 1382 (Mass. 1983).

²⁶⁹ 63A AM. JUR. 2D *Property* § 21 (1984).

²⁷⁰ *Id.*

²⁷¹ *Garweth Corp. v. Boston Edison Co.*, 613 N.E.2d 92, 94 (Mass. 1993). The Supreme Judicial Court first addressed this issue in *Hurley v. Cornell-Dubilier Electronics Corp.*, when the Federal District Court of Massachusetts upheld a motion *in limine* by the defense to keep out evidence of economic loss under chapter 21E because "personal property" should only apply to tangible property. D. Mass. 85-1417-T.

²⁷² 613 N.E.2d at 93.

²⁷³ *Id.*

²⁷⁴ *Id.*

Garweth claimed that due to this spill, coupled with the subsequent clean-up effort, it incurred monetary damages from a 157-day delay in completing its contract with BWSC.²⁷⁵ Garweth also claimed losses due to damage to a piece of its machinery, a compressor, which was struck by an unidentified vehicle during the clean-up process.²⁷⁶ Garweth's complaint was based on negligence, tort-based strict liability, and chapter 21E.²⁷⁷

Applying the physical injury rule preventing the recovery of purely economic losses without accompanying physical injury or property damage,²⁷⁸ the Massachusetts Supreme Judicial Court rejected Garweth's arguments for the recovery of economic losses under both negligence and strict liability theories.²⁷⁹ The court stated that this rule has been traditionally applied in a *Garweth*-type situation where a defendant negligently interferes with a contract or economic opportunity without causing harm to the person or property of another.²⁸⁰ The court rejected Garweth's contention that the damage to the compressor was sufficient to satisfy the physical property damage requirement of the physical injury rule.²⁸¹ The court stated that the damage to the equipment was due, not to Boston Edison's negligence, but to the efforts of CHI acting as an independent contractor hired to clean up the fuel oil spill.²⁸² The court also rejected Garweth's argument that the physical injury rule was inapplicable to environmental contamination cases.²⁸³ Garweth argued that other courts have prevented the application of the physical injury rule in pollution cases.²⁸⁴ The court held, however, that even if those decisions were of precedential value, they were inapplicable to the facts of *Garweth*.²⁸⁵

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*; *Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.*, 533 N.E.2d 1350, 1353 (Mass. 1989); *Stop & Shop Companies, Inc. v. Fisher*, 444 N.E.2d 368, 371 (Mass. 1983); RESTATEMENT (SECOND) OF TORTS § 766C (1977).

²⁷⁹ *Garweth*, 613 N.E.2d at 93-94.

²⁸⁰ *Id.* at 94.

²⁸¹ *Id.* at 93-94.

²⁸² *Id.*

²⁸³ *Id.* at 94.

²⁸⁴ *Id.* In *Union Oil Co. v. Oppen*, commercial fishermen were entitled to recover economic losses incurred after an oil spill interfered with their use of the sea. 501 F.2d 558, 568-70 (9th Cir. 1974). In *Birchwood Lakes Colony Club, Inc. v. Medford Lakes*, the owners of lakeside property were entitled to sue for damages from pollution of the lake from a nearby sewer treatment plant on a nuisance theory. 449 A.2d 472, 479 (N.J. 1982).

²⁸⁵ *Garweth*, 613 N.E.2d at 94.

The court then analyzed and rejected Garweth's claim for economic losses under chapter 21E.²⁸⁶ Garweth relied on § 5 of chapter 21E to argue that its losses should be categorized as damages to "personal property."²⁸⁷ The judge ruled, however, that personal property is defined to mean only tangible personal property.²⁸⁸ The court thus, held that because Garweth's claim was based only on economic losses arising out of a contract with a third party whose property was contaminated from the oil release, Garweth's losses were not damages to personal property.²⁸⁹ The court stated that the Massachusetts Legislature did not intend to allow for the recovery of economic losses which are not the direct result of environmental damage.²⁹⁰ Rather, the purpose of chapter 21E is "to clarify and improve the Commonwealth's capability for responding to releases of oil and hazardous materials and to recover response costs from persons responsible for releases for which it has incurred such costs."²⁹¹

Finally, the court stated that its conclusion was in keeping with CERCLA, chapter 21E's analogous federal counterpart.²⁹² The court observed that CERCLA allows for a private right of action by those incurring "injury" due to a cleanup or response to a hazardous material problem.²⁹³ Given the lack of injury in *Garweth*, the court argued that its holding, prohibiting the recovery of economic losses, was within the purview of CERCLA.²⁹⁴

B. *Garweth* Flawed

The Massachusetts Supreme Judicial Court's analysis in *Garweth* is flawed. First, it fails to give due consideration to the various developing trends in the common law, as well as in state statutory schemes. While the particular facts of *Garweth* may warrant a finding that economic losses should not be recoverable, the court needlessly used drastic measures to arrive at that result and in doing so, ignored various reasons to provide for the recovery of purely economic losses. While the physical injury rule, barring the recovery of purely eco-

²⁸⁶ *Id.* at 94-95.

²⁸⁷ *Id.* at 94.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* at 95 (citing *Nassr v. Commonwealth*, 394 Mass. 767, 774, 477 N.E.2d 987, 992 (1985), (quoting St. 1983, c. 7, emergency preamble)).

²⁹² *Garweth*, 613 N.E.2d. at 95.

²⁹³ *Id.*

²⁹⁴ *See id.*

conomic losses, has generally been upheld, recent trends have led courts to recognize the inappropriate nature of such a bright line standard in a modern industrial society.²⁹⁵ To avoid harsh results, courts have created various exceptions to the rule and have explored alternative theories to determine liability for economic loss.²⁹⁶ Second, while CERCLA regulates many aspects of hazardous waste liability, it grants states flexibility to adopt more comprehensive statutes governing broader aspects of liability.²⁹⁷ Various state Superfund statutes have taken this lead and have provided for the recovery of economic losses for environmental hazardous waste releases.²⁹⁸ Third, as a matter of statutory construction, the drafters of chapter 21E purposely chose to employ the term “personal property,” and the legislature adopted the provision in its entirety without qualification.²⁹⁹ Thus, chapter 21E must be interpreted as having the “plain meaning” of the words used in the statute so that “personal property” includes intangible, as well as tangible property.³⁰⁰ Fourth, the recovery of purely economic losses complies with the purpose behind chapter 21E and is provided for in § 4 of that statute.³⁰¹

1. Exceptions to the Physical Injury Rule Ignored

The *Garweth* court cites the physical injury rule to derive its holding preventing Garweth’s recovery of its purely economic losses.³⁰² The court, however, fails to sufficiently review the many exceptions to this rigid rule invoked by prior courts when the results of a case would otherwise be inequitable.³⁰³ While the Supreme Judicial Court states that there are cases in which plaintiffs have been allowed to recover damages for economic losses, it summarily dismisses them as inapplicable to Garweth’s situation.³⁰⁴

The court focused on the *Union Oil* case which involved a group of commercial fishermen who experienced economic losses due to an oil spill and were subsequently allowed to recover for those losses.³⁰⁵ The

²⁹⁵ See *supra* notes 84–99 and accompanying text.

²⁹⁶ See *supra* notes 100–76 and accompanying text.

²⁹⁷ See *supra* notes 213–15 and accompanying text.

²⁹⁸ See *supra* notes 216–33 and accompanying text.

²⁹⁹ MASS. GEN. L. ch 21E, § 5 (1992).

³⁰⁰ See Kernochan, *Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 333, 338–45 (1976).

³⁰¹ See *infra* notes 335–45 and accompanying text.

³⁰² *Garweth Corp. v. Boston Edison Co.*, 613 N.E.2d 92, 93–94 (Mass. 1993).

³⁰³ *Id.*; *supra* notes 100–76 and accompanying text.

³⁰⁴ *Garweth*, 613 N.E.2d at 94.

³⁰⁵ *Id.* at 94; *Union Oil Co. v. Oppen*, 501 F.2d 558, 568–70 (9th Cir. 1974).

court stated that these facts were too dissimilar to provide guidance in determining the outcome in *Garweth*.³⁰⁶ The facts of *Union Oil*, however, are similar to the situation in *Garweth* in that both cases involve a scenario in which a hazardous substance release has negatively affected the livelihood of a plaintiff who used the contaminated property.³⁰⁷ Then too, the *Garweth* plaintiff's intimate interest in its contract to perform services may be viewed as even stronger than the *Union Oil* plaintiff's interest in using a public waterway to which he had no intimate claim.³⁰⁸ In fact, such a contractual obligation has been held by one Massachusetts court to constitute intangible personal property.³⁰⁹ Thus, the court too quickly accepted and applied the physical injury rule without fairly considering the exceptions that other courts have instituted to escape the harshness and inflexibility of the physical injury rule and to allow for the recovery of purely economic losses.

2. Reliance on CERCLA Misguided

The Supreme Judicial Court also relies too heavily on the likenesses between chapter 21E and CERCLA to support its holding in *Garweth*.³¹⁰ In addressing *Garweth*'s chapter 21E claim, the court states that its holding prohibiting the recovery of purely economic losses under chapter 21E is consistent with CERCLA, the statute upon which chapter 21E is based.³¹¹ The court states that "under CERCLA, a private right of action is permitted for those who suffer injury resulting from a cleanup or response to a hazardous material problem."³¹²

The court, however, fails to recognize the significant differences between CERCLA and chapter 21E arising from the cooperative and flexible relationship between the two statutes.³¹³ CERCLA explicitly provides for a cooperative effort between the federal government and the states to clean up hazardous waste releases.³¹⁴ CERCLA also provides states with discretion to expand on the federal statute.³¹⁵

³⁰⁶ *Garweth*, 613 N.E.2d at 94.

³⁰⁷ See *id.* at 93; *Union Oil*, 501 F.2d at 568-70.

³⁰⁸ See *Garweth*, 613 N.E.2d at 93; *Union Oil*, 501 F.2d at 570.

³⁰⁹ *Treasurer and Receiver General v. John Hancock Mutual Life Ins. Co.*, 446 N.E.2d 1376, 1382 (Mass. 1983).

³¹⁰ *Garweth*, 613 N.E.2d at 95.

³¹¹ *Id.*

³¹² *Id.*

³¹³ See Warren, *supra* note 14, at 10,348.

³¹⁴ *Id.*

³¹⁵ *Id.*

Thus, many states, including Massachusetts, have enacted mini-Superfund statutes that, while similar to CERCLA, differ in many respects.³¹⁶ Chapter 21E significantly differs from CERCLA in various ways. For example, while CERCLA only applies to hazardous waste contamination, chapter 21E applies to oil releases as well.³¹⁷ In addition, CERCLA provides only for the recovery of necessary response costs,³¹⁸ while chapter 21E also allows for the recovery of damages to real or personal property.³¹⁹

Thus, CERCLA is obviously more limited in scope than chapter 21E and, therefore, cannot provide a useful guide for the recovery of purely economic losses under chapter 21E. Given the compelling differences between the two statutes, they should not be distorted in order to interpret them consistently.³²⁰ The Massachusetts Supreme Judicial Court itself stated that "... where the Federal provision is significantly different from the State provision, . . . reference to a Federal statute in an attempt to determine the intent of the Massachusetts Legislature would be both unnecessary and improper."³²¹ The Supreme Judicial Court also stated that "if the language of a statute differs in material respects from a previously enacted analogous Federal statute which the Legislature appears to have considered, a decision to reject the legal standards embodied or implicit in the language of the Federal statute may be inferred."³²² Thus, the Supreme Judicial Court in *Garweth* should have refused to mold its interpretation of chapter 21E on a provision of CERCLA that was significantly different from the Massachusetts law.³²³

The court, thus, could have interpreted chapter 21E to reach beyond CERCLA and to allow for the recovery of purely economic losses as other states previously have done.³²⁴ While not all states

³¹⁶ *Id.*

³¹⁷ MASS. GEN. L. ch. 21E, § 4 (1992); see *supra* note 237 and accompanying text. Chapter 21E and CERCLA, although similar, are not identical. Breckenridge, *supra* note 15, at 19.

³¹⁸ 42 U.S.C. §§ 9606, 9607(a)(4)(A)-(B) (1988 & Supp. III 1991).

³¹⁹ MASS. GEN. L. ch. 21E, § 5 (1992).

³²⁰ When statutes are virtually identical, construe one consistently with the other "absent compelling reasons to the contrary or significant differences in content." Griffith v. New England Tel. & Tel. Co., 585 N.E.2d 751, 753 (Mass. App. Ct. 1992) (quoting Rollins Envtl. Services, Inc. v. Superior Court, 368 Mass. 174, 180, 330 N.E.2d 814 (1975)).

³²¹ *Acme Laundry Co. v. Secretary of Envtl. Affairs*, 575 N.E.2d 1086, 1092-93 (Mass. 1991) (citing *Massachusetts Community College Council MTA/NEA v. Labor Relations Comm'n*, 402 Mass. 352, 354 (1988)).

³²² *Acme Laundry*, 575 N.E.2d at 1093 (quoting *Globe Newspaper Co. v. Boston Retirement Bd.*, 388 Mass. 427, 432-33, 446 N.E.2d 1051 (1983)).

³²³ See *Acme Laundry*, 575 N.E.2d at 1092-93.

³²⁴ See *supra* notes 216-33 and accompanying text.

have adopted this approach, the recovery of purely economic losses is slowly finding acceptance among state hazardous waste statutes.³²⁵ Both MERLA and the New Jersey Spill Act are two such statutes drafted in a more comprehensive fashion so as to impose liability for economic losses due to releases of hazardous waste.³²⁶ Given the position taken by these states, as well as the opportunity left open by CERCLA for states to impose more comprehensive regulations, Massachusetts would be justified in allowing for the recovery of economic losses under chapter 21E, despite CERCLA's language to the contrary.³²⁷ In fact, that is exactly what the Massachusetts Legislature intended to do by holding persons liable for damage to "real or personal property" in § 5.³²⁸

3. Legislative Intent

The court is also short-sighted when it concludes that the term personal property in chapter 21E applies only to tangible personal property because the Legislature likely did not intend to create a cause of action for the recovery of economic losses without accompanying property damage.³²⁹ In the past, however, when state legislatures have desired to narrow the scope of the term personal property, they have explicitly used the adjective "tangible" as a qualification in the statute itself.³³⁰ The Massachusetts Legislature, however, purposely included liability for damage to personal property under chapter 21E without limiting its meaning to only tangible personal property.³³¹ In addition, the term personal property could have been excluded from the statute during the legislative process as it was in CERCLA, yet the Massachusetts Legislature voted to include it.³³² Given the lack of any qualifying language employed to limit the meaning of the term personal property in the context of chapter 21E, the broad definitions of personal property should apply so as to include intangible, as well as tangible property.³³³ It is thus logical that a business' right to receive "the fruits of its labor" is such an intangible

³²⁵ See *supra* notes 216–33 and accompanying text.

³²⁶ See *supra* note 220 and accompanying text.

³²⁷ See *supra* notes 213–33 and accompanying text.

³²⁸ See MASS. GEN. L. ch. 21E, § 5 (1992).

³²⁹ *Garweth Corp. v. Boston Edison Co.*, 613 N.E.2d 92, 94 (Mass. 1993).

³³⁰ 63A AM. JUR. 2D *Property* § 21 (1984).

³³¹ See MASS. GEN. L. ch. 21E, § 5 (1992).

³³² See *id.*

³³³ *Id.*; 63A AM. JUR. 2D *Property* § 21 (1984).

personal property interest that chapter 21E contemplates when it imposed liability for damages to personal property.³³⁴

4. Purpose Behind Chapter 21E

The court also states that the recovery of economic losses under chapter 21E runs counter to the purpose of chapter 21E, “to clarify and improve the Commonwealth’s capability for responding to releases of oil and hazardous material and to recover response costs from persons responsible for releases for which it has incurred such costs.”³³⁵ The court then, focusing on the second prong of the statute’s stated purpose, concluded that chapter 21E did not mandate the recovery of economic losses in this case because Garweth never brought a claim for the recovery of response costs—costs of assessment, containment, or removal of hazardous substances.³³⁶ Yet, if the Massachusetts Legislature intended chapter 21E to provide only for the recovery of response costs, the inclusion of § 5(a)(5)(iii), providing that anyone responsible for a release of hazardous waste shall be liable to any person for damage to his real or personal property due to the release, would be superfluous.³³⁷ What other purpose could this clause serve, but to allow plaintiffs who have suffered personal property losses due to hazardous waste releases, to recover their losses from those responsible? The court thus infers from chapter 21E, a purpose so limited that, if exclusively relied upon, would render this provision of the statute meaningless.³³⁸

The court more accurately reflects the overall purpose of chapter 21E in the first prong of its standard when it describes the statute’s object to provide the Commonwealth with a more efficient and effective means to clean up hazardous substance releases.³³⁹ Providing for the recovery of purely economic losses would certainly achieve that goal. In a modern industrial society, encouraging those who are involved with hazardous waste to exhibit caution and care during their utilization of these wastes is crucial. Potential liability for the purely economic effects of hazardous waste releases would deter those who use, own, transport, or store these substances from carelessly releasing them into the environment. Such deterrence would thus minimize

³³⁴ Rosenblatt & Floyd, *supra* note 1, at 1507.

³³⁵ See *Garweth Corp. v. Boston Edison Co.*, 613 N.E.2d 92, 95 (Mass. 1993).

³³⁶ *Id.*

³³⁷ See ch. 21E, § 5(a)(5)(iii).

³³⁸ See *Garweth*, 613 N.E.2d at 95.

³³⁹ *Id.*

the amount of environmental contamination necessary for the Commonwealth to clean up and thereby effectuate this purpose of chapter 21E.³⁴⁰

5. Damages Defined in Chapter 21E

Lastly, the Court chose to ignore the definition of damages encompassing economic losses provided in chapter 21E § 4.³⁴¹ Section 4 states that “any person . . . who provides care, assistance or advice in response to a release or threat of release of oil into or onto the tidal waters of the United States . . . and such care, assistance or advice is consistent with applicable state law, or the National Contingency Plan . . . shall not be liable, . . . for removal costs or damages which result from actions taken . . . in the course of providing such care, assistance, or advice”³⁴² The statute then defines damages for purposes of that paragraph as “any damages, costs, expenses or economic loss of any kind for which liability may exist under the laws of this state resulting from . . . the discharge . . . of oil.”³⁴³ While this definition is specific to protecting clean-up workers from liability, the legislature specifically recognizes that economic losses will likely result from such releases.³⁴⁴ While § 4 provides those who assist in restoring the environment with an exclusion from liability, this definition implies that those who cause similar releases should also be liable for economic losses incurred as a result of their conduct.³⁴⁵

V. A SOLUTION: AMEND CHAPTER 21E

The Massachusetts Legislature should follow the lead taken by various courts and legislatures to explicitly provide for the recovery of economic losses under chapter 21E. This would prevent a forced interpretation of the term “personal property” in chapter 21E to include only tangible property so as to achieve results consistent with the physical injury rule to *per se* bar recovery for purely economic losses. Such a *per se* rule is inappropriate in a modern industrial society replete with hazardous waste releases. The Massachusetts Supreme Judicial Court’s narrow interpretation of personal property to include only tangible property, while consistent with the physical

³⁴⁰ See *id.*

³⁴¹ MASS. GEN. L. ch. 21E, § 4 (1992).

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ See *id.*

injury rule, is archaic and incompatible with the evolving common law, as well as with the approaches taken by various state legislatures.³⁴⁶ Rather, the Massachusetts Legislature should take the initiative and amend chapter 21E to define personal property as including intangible, as well as tangible property and thus, provide for the recovery of purely economic losses.³⁴⁷ The Massachusetts courts have already categorized contractual obligations as personal property.³⁴⁸ The courts should now also include a business' rights to its profits within the rubric of personal property.³⁴⁹ This amendment may be implemented either by simply adding "tangible or intangible" to qualify the term personal property in § 5, or by explicitly stating in § 5 that persons may be liable for damages to real or personal property "including economic losses."³⁵⁰

Such an amendment by itself, however, would be undesirable because, as the advocates for the physical injury rule convincingly argue, unlimited recovery for economic losses may result in unlimited defendant liability, frivolous claims, mass litigation, and liability disproportionate to the defendant's fault.³⁵¹ Thus, while a *per se* rule denying liability is unnecessary, there exists a need to impose some limit on the recovery of purely economic losses.³⁵² As the *People Express* court stated, the need to curtail recovery for economic losses

supports only a limitation on, not a denial of, liability. The physical harm requirement capriciously showers compensation along the path of physical destruction, regardless of the status of circumstances of individual claimants. Purely economic losses are borne by innocent victims, who may not be able to absorb their losses In the end, the challenge is to fashion a rule that limits liability but permits adjudication of meritorious claims. The asserted inability to fix crystalline formulae for recovery on the differing facts of future cases simply does not justify the wholesale rejection of recovery in all cases.³⁵³

Thus, a balance between limiting liability, while allowing for the recovery of economic losses, is encouraged.³⁵⁴ Various courts have

³⁴⁶ See *Garweth Corp. v. Boston Edison Co.*, 613 N.E.2d 92, 94 (Mass. 1993); see *supra* notes 84-176, 216-33 and accompanying text.

³⁴⁷ See *supra* notes 295-345 and accompanying text.

³⁴⁸ *Treasurer and Receiver General v. John Hancock Mutual Life Ins. Co.*, 446 N.E.2d 1376, 1382 (Mass. 1983).

³⁴⁹ See *Rosenblatt & Floyd*, *supra* note 1, at 1507.

³⁵⁰ See MASS. GEN. L. ch. 21E, § 5 (1992).

³⁵¹ See *supra* notes 59-62 and accompanying text.

³⁵² *People Express Airlines v. Consolidated Rail*, 495 A.2d 107, 111 (N.J. 1985).

³⁵³ *Id.*

³⁵⁴ See *id.*

tried to achieve this balance through the use of such theories as duty, proximate cause, foreseeability, special injury, and direct versus indirect harm.³⁵⁵ Many of these methods, however, have been applied in a haphazard fashion leaving no concise standard of law regarding when purely economic losses may be recovered.³⁵⁶ While these theories are useful measuring sticks when dealing with certain harms, the courts should adopt a more fair and evenhanded approach to imposing liability for economic losses due to the release of hazardous substances into the environment.³⁵⁷

A. A Standard of Recovery

The approach that the Massachusetts Legislature and courts should adopt in the chapter 21E context is the approach applied in *People Express v. Consolidated Rail Corp.* and seconded by commentators—to impose liability for economic losses when the defendant could foresee the type of harm that his or her actions would cause to a particular plaintiff class, and when the defendant's conduct was the proximate cause of a particularly foreseeable injury to the plaintiff's economic interests.³⁵⁸ Courts have used this approach to evenhandedly hold responsible parties liable for economic losses.³⁵⁹ In *People Express*, the court held that the defendant had a duty to exercise reasonable care to avoid the risk of inflicting economic damages on a particular, identifiable class of plaintiff that the defendant knew or should have known was likely to suffer economic losses because of the defendant's conduct.³⁶⁰ A defendant who breached this duty would be held liable

³⁵⁵ See *supra* notes 107–63 and accompanying text.

³⁵⁶ See *Pruitt v. Allied Chemical Corp.*, 523 F. Supp. 975, 979–80 (E.D. Va. 1981); see *supra* notes 100–76 and accompanying text. For example, the United States District Court for the Eastern District of Virginia in *Allied*, realizing the possibility of an infinite number of potential plaintiffs, sought to limit liability by instituting a bar to recovery to certain plaintiff classes. 523 F. Supp. at 979–80. The method the court used to limit liability was purely subjective and involved distinguishing between damages that were sufficiently direct to allow for recovery and those that were too indirect to deserve compensation. *Id.* The court in *Allied* drew the line arbitrarily at the water's edge when determining which economic losses were sufficiently direct so that equity and fairness would be preserved. *Id.* at 980. Yet, by drawing the line where it did, the court implied that the damages incurred by those plaintiffs beyond the water's edge were not as deserving of compensation as the “direct” damages suffered by those closer to the water. See *id.* This reasoning is invalid because restaurateurs and seafood dealers certainly lose as much from the damaged Bay ecology as boat, bait and tackle shops. See *id.*

³⁵⁷ *People Express*, 495 A.2d at 111.

³⁵⁸ *Id.* at 116–18; Hnatt, *supra* note 21, at 1202–06.

³⁵⁹ See *People Express*, 495 A.2d at 116–18.

³⁶⁰ *Id.* at 116. “Thus, knowledge or special reason to know of the consequences of the tortious conduct in terms of the persons likely to be victimized and the nature of the damages likely to

for economic losses that were proximately caused by his failure to exercise this duty.³⁶¹ Thus, the court used as a liability limiting device, the requirements that the defendant be able to identify a particular class of plaintiff, and that the defendant's actions be the proximate cause of a particularly foreseeable injury to the plaintiff's economic interests.³⁶² Through these requirements, the court instituted an element of foreseeability with respect to both identifying a plaintiff class, as well as the type of harm it would incur.³⁶³

In order to determine what constitutes an identifiable class of plaintiff, the *People Express* court focused on a variety of factors—the probability of their presence near the scene, the number of plaintiffs who would be injured, the type of individuals who would be affected, and the type of economic expectations that such individuals possessed.³⁶⁴ The court also required that the defendant be able to foresee this class of plaintiff with particularity.³⁶⁵ A foreseeable class of plaintiffs is insufficient.³⁶⁶ Rather, “an identifiable class of plaintiffs must be particularly foreseeable in terms of the type of persons or entities comprising the class, the certainty or predictability of their presence, the approximate numbers of those in the class, as well as the type of economic expectations disrupted.”³⁶⁷ Thus, a member of the general public, a serviceman, or a nearby traveler, would not constitute an identifiable plaintiff class even though they may be foreseeable because their presence was merely fortuitous, and their economic injury suffered would be hard to ascertain.³⁶⁸

be suffered will suffice to impose a duty upon the tortfeasor not to interfere with economic well-being of third parties.” *Id.* at 115; Hnatt, *supra* note 21, at 1204.

³⁶¹ *People Express*, 495 A.2d at 116.

³⁶² *Id.* at 116–18.

³⁶³ *Id.* at 116.

³⁶⁴ *Id.* The factors in *People Express* that led the court to hold that a cause of action had been satisfied were the proximity of the People's terminal to the freight yard, the nature of the plaintiff's operations, the particular foreseeability of economic losses resulting from an accident and evacuation, the defendant's actual knowledge of the dangerous properties of the chemicals, and the existence of an emergency response plan prepared by defendants calling for nearby areas to be evacuated to avoid harm caused by an explosion. *Id.* at 118.

³⁶⁵ *Id.* at 116; Hnatt, *supra* note 21, at 1205.

³⁶⁶ *People Express*, 495 A.2d at 116; Hnatt, *supra* note 21, at 1205.

³⁶⁷ *People Express*, 495 A.2d at 116.

³⁶⁸ *Id.* An example of this identifiable class standard can be seen in *Pruitt v. Allied Chemical Corp.* 523 F. Supp. 975 (E.D. Va. 1981). In *Allied*, the defendant was able to foresee that certain seafood wholesalers, retailers, processors, distributors and restaurateurs would be in the vicinity of the release. *Id.* at 979–80. It could also have known the number and type of such plaintiffs who would be injured by a release of hazardous materials into the Bay, as well as their economic expectations of profit from the Bay. *Id.* Thus, under the *People Express* approach to the recovery of economic losses, the plaintiffs in *Allied* would have had a greater chance of recov-

Then too, the court used the standard of particular foreseeability to determine whether the economic injury was proximately caused by the defendant's conduct and thus, compensable.³⁶⁹ Factors examined by courts to determine whether economic injury was proximately caused consist of whether the economic injury was close in time and space, whether the defendant had ample opportunity to ascertain the identity and nature of the plaintiff's interests, and whether the amount of litigation and extent of liability was finite, as opposed to expansive.³⁷⁰ Thus, "economic losses are recoverable as damages when they are the natural and probable consequence of a defendant's negligence in the sense that they are reasonably to be anticipated in view of defendant's capacity to have foreseen that the particular plaintiff or identifiable class of plaintiffs, . . ., is demonstrably within the risk created by defendant's negligence."³⁷¹

The Massachusetts Legislature should adopt this approach as an amendment to chapter 21E § 5. Such an amendment may be achieved by replacing the current § 5 with an increasingly modern provision holding responsible parties strictly liable for damage to real or tangible and intangible personal property, including economic losses when they are imposed by a defendant who can identify the particular plaintiff class that will be so injured, and when the defendant's actions are the proximate cause of a particularly foreseeable injury to the plaintiff's economic interests.³⁷²

B. Benefits of Standard

Commentators and courts have noted that the *People Express* standard addresses the major concerns initially responsible for the widespread utilization of the physical injury rule to bar recovery for purely economic losses.³⁷³ These sources have hailed the *People Express* standard as a useful method for limiting a defendant's liability, preventing frivolous suits and mass litigation, and assuring that liability will be imposed in proportion to a defendant's fault.³⁷⁴

ering their very real economic losses. See *Allied*, 523 F. Supp. at 980; *People Express*, 495 A.2d at 118.

³⁶⁹ *People Express*, 495 A.2d at 117.

³⁷⁰ *Id.* (construing *Henry Clay v. Jersey City*, 181 A.2d 545 (N.J. Super. Ct. Ch. Div. 1962), *aff'd*, 200 A.2d 787 (N.J. Super. Ct. App. Div. 1964)).

³⁷¹ *Id.* at 118 (citation omitted).

³⁷² See MASS. GEN. L. ch. 21E, § 5 (1992); *People Express*, 495 A.2d at 118; Hnatt, *supra* note 21, at 1204.

³⁷³ *People Express*, 495 A.2d at 110-11, 116-18; Hnatt, *supra* note 21, at 1203-06.

³⁷⁴ *People Express*, 495 A.2d at 110-11, 116-18; Hnatt, *supra* note 21, at 1203-06.

The *People Express* standard provides a means for limiting the liability of a defendant while preventing both frivolous suits and mass litigation.³⁷⁵ In order for a defendant to be held liable for purely economic losses, the defendant must be able to particularly foresee the identifiable plaintiff class that would be harmed by its conduct, and the defendant's actions must be the proximate cause of a particularly foreseeable injury to the plaintiff's economic interests.³⁷⁶ Through this approach, liability is reserved only for those defendants who meet this standard, rather than encompassing all defendants who happen to cause economic loss.³⁷⁷ Therefore, while the potential for unlimited liability for economic losses is genuine, it is effectively allayed by a mere limitation, not a complete bar, to recovery.³⁷⁸

In addition, the *People Express* standard imposes liability in proportion to the defendant's fault through the requirement of particular foreseeability.³⁷⁹ While economic losses are often generally foreseeable, the *People Express* standard requires a higher level of awareness, consisting of either knowledge or particular foreseeability, in order to recover.³⁸⁰ The court employed this approach because to otherwise impose liability for risks that a defendant cannot possibly foresee is to blindly assign liability disproportionately to the defendant's fault.³⁸¹ Thus, by imposing liability only for those acts which the defendant knows or can particularly foresee are likely to cause identifiable economic injuries to identifiable plaintiffs, the *People Express* standard imposes only proportional liability.³⁸²

The *People Express* court, as well as commentators, have also described this limited recovery of economic losses as consistent with the underlying principle of tort law—that persons wronged by others

³⁷⁵ See *People Express*, 495 A.2d at 110–11; 116–18; Hnatt, *supra* note 21, at 1203–04, 1206.

³⁷⁶ *People Express*, 495 A.2d at 118.

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 111.

³⁷⁹ See *id.* at 117–18.

³⁸⁰ *Id.* at 117; see also *Rickards v. Sun Oil Co.*, 41 A.2d 267, 269 (N.J. 1945). In *Rickards*, the court denied the plaintiff recovery for losses from expectant gains when the defendant's barge negligently destroyed a bridge that was the only means of access to the plaintiff's business. 41 A.2d at 268, 269–70. The court held that "no ordinary prudent person could reasonably have been expected to have foreseen the resultant injurious consequences . . ." *Id.* at 269. The *People Express* court explains that this result was likely to prevent the disproportionate imposition of liability because the economic losses were not particularly foreseeable. 495 A.2d at 117.

³⁸¹ *People Express*, 495 A.2d at 117.

³⁸² *Id.* at 117–18. The extent of liability is dependent on the degree of foreseeability in that the more foreseeable that a particular plaintiff will suffer economic loss due to the defendant's negligence, the more reason to impose liability and allow for recovery. *Id.* at 115–16.

should be entitled to compensation for their losses from those responsible for the wrong.³⁸³ In tort law, defendants are only liable for harms that were reasonably foreseeable risks of their actions.³⁸⁴ This ensures that defendants are punished only for damages they could have foreseen and taken steps to prevent.³⁸⁵ The *People Express* standard, through the notion of foreseeability, similarly imposes liability only on those defendants who could have avoided their conduct.³⁸⁶

Allowing for the limited recovery of purely economic losses in the hazardous waste context will also serve important goals. First, the recovery of these losses will encourage those who deal with dangerous, hazardous materials to exercise tremendous care while handling, transporting, or storing these substances so as to avoid liability for their release. By imposing this threat of liability for one's wrongs, those involved with the use of hazardous materials will be discouraged from engaging in tortious behavior.³⁸⁷ In addition, providing for the recovery of purely economic losses will ensure proper compensation to persons or businesses harmed by releases of hazardous waste.³⁸⁸ Then too, the *People Express* standard abolishes the physical injury rule's arbitrary protection of only those victims of economic loss who have also suffered accompanying physical injury or property damage.³⁸⁹ In its place, this new standard provides all victims of hazardous waste releases with a potential avenue for legal redress.³⁹⁰ Under this standard, sufferers of purely economic losses will no longer be faced with the brick wall imposed by the physical injury rule which has too often left these plaintiffs to bear the tremendous costs of hazardous waste cleanup on their own.³⁹¹

The Massachusetts Legislature should, therefore, amend chapter 21E to include economic losses within the purview of personal property by specifically defining personal property as including intangible property and explicitly including economic losses within its purview.³⁹² Yet, to avoid unlimited liability, the legislature should also provide for a standard of recovery for purely economic losses similar to the stand-

³⁸³ *Id.* at 111; Hnatt, *supra* note 21, at 1203.

³⁸⁴ *People Express*, 495 A.2d at 117.

³⁸⁵ *Id.*

³⁸⁶ *See id.*

³⁸⁷ *See id.* at 111, 117.

³⁸⁸ *See id.* at 111.

³⁸⁹ *See id.* at 118; Hnatt, *supra* note 21, at 1211.

³⁹⁰ *See People Express*, 495 A.2d at 118; Hnatt, *supra* note 21, at 1211.

³⁹¹ *People Express*, 495 A.2d at 118.

³⁹² *See supra* notes 346-50 and accompanying text.

ard expressed in *People Express*.³⁹³ Instead of imposing liability for all economic losses, the statute should focus on defendants who could particularly foresee the identifiable plaintiff class that would be harmed by their conduct, and whose actions were the proximate cause of a particularly foreseeable injury to the plaintiff's economic interests.³⁹⁴

VI. CONCLUSION

Chapter 21E seeks to provide recovery for parties that incur hazardous substance clean-up costs. Allowing businesses to recover for purely economic losses, as well as for property damage will help to achieve this goal. The common law has always allowed for such economic loss recovery when the victims of hazardous waste releases have also suffered physical injury or property damage. The more challenging question arises when a business seeks to recover economic losses when it hasn't suffered any physical injury or property damage. In this situation, the common law and various state statutes have allowed for the recovery of these losses when it would be inequitable to provide otherwise.

The Massachusetts Legislature should adopt this practice of allowing businesses to recover for purely economic losses under chapter 21E. Economic losses to businesses are often more serious than property damages and may, in certain instances, force a business into bankruptcy. By allowing economic losses to be recovered as personal property, chapter 21E will better provide those forced to endure hazardous waste related losses with a chance to recover. Chapter 21E will also serve as a deterrent to those who deal with hazardous substances while preventing unlimited liability, frivolous suits, mass litigation, and the disproportional imposition of liability.

³⁹³ See *People Express*, 495 A.2d at 118.

³⁹⁴ MASS. GEN. L. ch. 21E, § 5 (1992); *People Express*, 495 A.2d at 118.